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LESSONS LEARNED FROM RECENT PROCUREMENT FRAUD INVESTIGATIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
DEFENSE INDUSTRY AND TECHNOLOGY

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

MARCH 21, 1990

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CONTENTS

CHRONOLOGICAL LIST OF WITNESSES

MARCH 21, 1990

	Page
Betti, Hon. John A., Under Secretary of Defense for Acquisition, U.S. Department of Defense	03
Welch, Hon. John J., Jr., Assistant Secretary of the Air Force (Acquisition)	16
Conver, Hon. Stephen K., Assistant Secretary of the Army for Research, Development and Acquisition	24
Beach, Chester Paul, Jr., Principal Deputy General Counsel and Director, Procurement Task Force, U.S. Department of the Navy	41
Crawford, Hon. Susan J., Inspector General, U.S. Department of Defense, accompanied by Stephen A. Trodden, Assistant Inspector General for Auditing, and Morris B. Silverstein, Assistant Inspector General for Criminal Investigations Policy and Oversight	69

LESSONS LEARNED FROM RECENT PROCUREMENT FRAUD INVESTIGATIONS

WEDNESDAY, MARCH 21, 1990

U.S. SENATE,
SUBCOMMITTEE ON DEFENSE INDUSTRY AND TECHNOLOGY,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:02 p.m., in room SR-232-A, Russell Senate Office Building, Senator Jeff Bingaman [chairman of the subcommittee] presiding.

Committee members present: Senators Bingaman, Wirth and Wallop.

Committee staff members present: Andrew S. Effron, general counsel; and Geary Burton, counsel.

Professional staff member present: William H. Smith.

Minority staff members present: Patrick A. Tucker, minority staff director and counsel; Jonathan L. Etherton, Judith A. Freedman, and George W. Lauffer, professional staff members.

Staff assistants present: Elizabeth Ann Harlow, Melissa Ann Ramsey, and Mickie Jan Wise.

Committee members' assistants present: Edward M. McGaffigan, Jr., and John Gerhart, assistants to Senator Bingaman; Melvin G. Dubee, assistant to Senator Byrd; Lee E. Whittaker, assistant to Senator Wallop; and Eric H. Thoemmes, assistant to Senator Coats.

OPENING STATEMENT OF SENATOR JEFF BINGAMAN, CHAIRMAN

Senator BINGAMAN. The subcommittee meets today to receive testimony from the Department of Defense on lessons that have been learned from recent procurement fraud investigations.

Nearly 3 years have passed since the first revelations about the so-called Ill Wind Investigation focused public attention on the potential for abuse in the source selection process, improper trafficking in internal Government documents, abuses by marketing consultants, consultant conflicts of interest and corruption of Government officials through the use of illegal gratuities.

To date, a great deal of public attention has been given to the investigations and prosecutions of specific instances of fraud. The purpose of today's hearing is to go beyond the exposure of fraud, waste and abuse and determine what changes, if any, have been made or should be made in light of the procurement fraud cases to ensure that the acquisition decisions we make are wise, efficient and economical. Particularly in an era of declining budgets, there are serious questions about whether we can address these problems

simply through the enactment of increasingly complex laws and regulations with the attendant expansion of Government oversight activities and contractor overhead expenditures, or whether more cost effective approaches could be pursued.

We have asked today's witnesses to focus specifically on the impact of the suspension of the so-called procurement integrity laws on the Department of Defense and to provide recommendations as to whether these laws should be reinstated, modified, replaced by other legislation or repealed. In the past we have not had a great deal of success in obtaining useful recommendations from the executive branch during consideration of the procurement integrity legislation.

The legislation was adopted in 1988 only after the Senate sought the views of the administration, and we were advised by OMB (Office of Management and Budget) that the final version "satisfies the concerns raised by the administration on previous versions of the legislation," and also being advised that the administration supported its passage.

There was no suggestion or warning from OMB at that time that there were serious problems with any section of the procurement integrity law or the revolving door provisions in particular. In 1989 there was substantial publicity about employees leaving the Government to avoid coming under these new rules, as well as concern about the adverse impact on recruiting of new employees. Now, this subcommittee received detailed testimony from outside witnesses expressing concern about the new law, but virtually no comment from the Department of Defense.

Last year we made a number of useful clarifications to the law. Subsequent to enactment of these clarifications, the administration then orchestrated an agreement with the House to repeal the procurement integrity provisions. Unfortunately, there was no consultation with the Senate, and when a number of Senators raised questions, the administration advocated a suspension of the law for a year. The suspension has created a substantial degree of uncertainty and concern both among Government employees and contractor employees. This year Congress and the administration must work together more closely to ensure a carefully considered outcome that enhances the efficiency, effectiveness and integrity of the acquisition system.

The year's suspension has created an opportunity to determine whether the procurement integrity provisions should be reinstated, should be modified or should be repealed. As a first step, we need to ascertain the position that the Department of Defense takes. DOD, which undertakes more than 75 percent of the Government's procurement activities, is in the best position to provide us with a good assessment of the law.

It has been our hope that an early, clear and comprehensive proposal from the administration would provide the opportunity for careful consideration during this year of suspension. To date we have not seen such a proposal. In my view, this is one area in which Congress and the administration need to work together to come up with sound legislation. We must have the Department's best judgment as to what legislative action should be taken with

respect to the issues raised by the suspension of the procurement integrity provisions.

Our first witness is Under Secretary of Defense, John Betti, who will be accompanied by representatives of the military departments: Assistant Secretary of the Army for RDA, Stephen Conver; Assistant Secretary of the Air Force, John Welch; and Director of the Navy Procurement Task Force, Chester Paul Beach.

Mr. Betti, our members take pride in crafting the legislation that created your position, the one you are now holding, and we have enjoyed the opportunity to work with you on several difficult issues. We appreciate your willingness to be here today, and all of your colleagues from the services as well, and we look forward to your testimony.

I understand Senator Wallop may be here, and when he arrives, of course, we will take whatever statement he would like to make at that time.

Why don't you go ahead, Mr. Betti, with any statement you have?

STATEMENT OF HON. JOHN A. BETTI, UNDER SECRETARY OF DEFENSE FOR ACQUISITION, U.S. DEPARTMENT OF DEFENSE

Mr. BETTI. Thank you, Senator. I have a prepared statement which I would like to submit for the record, if I may.

Senator BINGAMAN. It will be included, and we will include all the prepared statements in the record. And if you could summarize, that would be great.

Mr. BETTI. I do have some summary comments I would like to make, if I may.

I am pleased to be here this afternoon to discuss with you the need for section 27 of the Office of Federal Procurement Policy Act, but let me first say that the goal of the Department of Defense is the common acceptance and observance of ethical standards throughout Government and industry. We intend to create an environment where standards of conduct are well understood, broadly observed, and vigorously enforced in every aspect of our business. We cannot tolerate dishonesty or unethical behavior. We must vigorously pursue and prosecute illegal acts and at the same time, we must respect the rights and dignity of individuals and not unnecessarily add to the complication and confusion of conducting our business or in doing business with us.

One of the primary purposes of the Defense Management Report is to make DOD a more sensible customer so there is less opportunity for firms to engage in misconduct.

We fully support the objectives of the laws regulating post-employment conflict of interest and procurement integrity. No one should obtain insider information and thus gain an unfair competitive advantage in procurement. No Government official should switch sides to give a new employer a similar advantage. Further, those offering, soliciting or accepting bribes, should be punished severely.

The fact that we support these concepts, however, does not mean we agree with the confusing plethora of statutes which seek to prevent and punish this conduct. As it now stands, neither Govern-

ment employees nor those in industry can be sure of what the laws really say. Inconsistent, overlapping laws do not promote better management and conduct. They hinder the cultural change that we are attempting to create in the acquisition business today.

The principal message I want to deliver today is this: we must have your help in rationalizing these laws. We need unified statutes written clearly which permit good people working diligently to do their jobs without the current atmosphere of confusion. In turn, we must have the capability to punish dishonest behavior.

To date, there have been 34 convictions as a result of the Ill Wind Investigation. All of these convictions were accomplished under laws that were in effect prior to the effective date of section 27. In addition, we have sufficient administrative and contractual remedies to deal with tainted contractors. Therefore, the suspension of section 27 is a positive step, providing Congress and the executive branch with an opportunity to resolve many of the difficult problems that you mentioned which arose when the act first came into being.

Mr. Chairman, in summary, we are working actively to improve the process to ensure that taxpayer dollars are spent to acquire real value and are protected against waste, fraud and abuse. I look forward to working with you and your colleagues on these and other important issues.

Thank you for the opportunity to appear before the subcommittee, and I and my colleagues will be happy to answer any questions you may have.

[The prepared statement of Mr. Betti follows:]

STATEMENT BY

MR. JOHN BETTI

UNDER SECRETARY OF DEFENSE FOR
ACQUISITION

Mr. Chairman and Members of the Subcommittee:

I am John Betti, Under Secretary of Defense for Acquisition. I am pleased to be here this afternoon to discuss with you the need for section 27 of the Office of Federal Procurement Policy (OFPP) Act, sections 2397a and 2397b of Title 10, United States Code, and section 281 of Title 18, United States Code. Let me first say that the goal of the Department of Defense (DoD) is the common acceptance and observance of ethical standards throughout Government and industry. We intend to create an environment where standards of conduct are well understood, broadly observed, and vigorously enforced in every aspect of our business.

Misconduct in connection with Defense procurement that is the intentional failure to comply with the laws and the terms and conditions of our contracts is not new. However to say that misconduct is not new is not to say that it should be tolerated. Secretary Cheney, Deputy Secretary Atwood and I are committed to changes in the management of the Department that will make this clear. The Packard Commission Report to the President stated that misconduct has occurred under administrations of both parties and in times of both increases and decreases to the budget. The Report concluded that misconduct persists in spite of legislative and administrative efforts to eradicate it.

Indeed, the Report went on to say, intensified federal regulation has not only increased costs and lead-time, but may have actually decreased the sense of individual and corporate responsibility for the quality of products and services. Also, it stated, the sense of moral and ethical responsibility may have been overridden by the "gamesmanship" attitude fostered by regulatory adversarialism.

The DMR provided a plan to implement fully the Packard Commission recommendations; improve substantially the performance of the defense acquisition system; and manage more effectively the DoD and the defense resources. One of the primary purposes of the DMR is to make DoD a more sensible customer so there is less reason and opportunity for firms to engage in illegal conduct. Simplifying and streamlining the process is necessary. We are clarifying and keeping those regulations needed to ensure an effective system, but eliminating those that are redundant and unclear. Other objectives of the DMR include reducing overhead costs while maintaining military strength, enhancing weapon systems program performance, reinvigorating the planning and budgeting process, reducing micromanagement, strengthening the defense industrial base, and improving observance of ethical standards in government and industry.

Since the goal of improving observance of ethical standards in Government and industry is especially pertinent to this hearing, I will discuss it briefly. The Secretary chartered a DoD Ethics Council consisting of the USD(A) and the Secretaries of the Military Departments to develop ethics programs for the

Department. The Council has established a joint working group headed by the Director, Ethics Training and Communications Policy to:

o Develop a proposed model ethics program for DoD (including education and training).

o Develop broader programs to enhance awareness and understanding of ethical issues.

o Review existing compliance programs for needed enhancements.

The Packard Commission Report also urged defense contractors to improve corporate policies and procedures related to ethical business conduct. Some companies have made significant steps in this area. Research conducted by the Ethics Resource Center disclosed that 97 percent of the top 200 defense contractors have adopted codes of conduct as a measure of self governance. More needs to be done and we intend to encourage further improvement.

We fully support the objectives of the laws regulating post-employment conflicts of interest and procurement integrity. No one should obtain "insider" information and thus gain an unfair competitive advantage in a procurement. No government official should switch sides to give a new employer a similar advantage. Further, those offering or soliciting bribes should be punished severely.

That we support these concepts, however, does not mean we agree with the confusing plethora of statutes which seek to prevent and punish this conduct. As the law now stands, neither government employees nor those in industry can be sure of what

the law really says. Inconsistent, overlapping laws don't promote better management and conduct. They hinder the cultural change we are attempting to create in the acquisition business today.

The principal message I want to deliver today is this; we must have your help in rationalizing these laws. We need unified statutes, written clearly, which permit good people, working diligently, to do their jobs without the current atmosphere of confusion. There are many laws that could apply to the improper release of proprietary and procurement sensitive information. Instead of five laws, see attachment, imposing post-employment limitations, we should have only one. Instead of four laws, see attachment, covering bribes and gratuities, we should have only one. The laws should be tough. But the laws should be clear and consistent, covering the entire government.

Recent Investigations

To date, there have been 34 convictions as a result of the Ill Wind investigation. All of these convictions were accomplished under laws that were in effect prior to the effective date of section 27 of the OFPP Act. These are fundamental crimes, such as illegally obtaining classified documents, bribery, and accepting gratuities. As a result of these convictions a strong message has been given to would-be wrong doers that the Government will not tolerate such behavior.

In addition to Ill Wind, investigations and convictions of fraud for such things as product substitutions, test results,

time card preparation, and overbillings seem to be the most frequent. These are not crimes unique to the procurement world. They do not demonstrate a need for changes in procurement law. We did make changes to our regulations as a result of these investigations to improve the process. For example, as a result of Ill Wind we made regulatory changes as follows:

o Issuance of new coverage limiting multiple best and final offers. The Defense Federal Acquisition Regulation Supplement (DFARS) (215.611) now requires that each request for more than one best and final offer be approved at levels above the contracting officer. This change was needed because multiple best and final offers could have the effect of lengthening the procurement process, causing technical leveling of proposals, encouraging "cost auctions" and, creating more opportunities for improperly obtaining or releasing acquisition-related information. I note that there have been only 257 (0.4%) multiple best and final offers out of 57,036 competitive procurements over $25,000 since the regulation went into effect.

o We are completing work on a regulation which prescribes uniform procedures for dissemination of, and access to, acquisition-related information. Our general policy is to make the maximum amount of acquisition-related information available to the public. There are only four exceptions to this policy; statutory restrictions, classified information, contractor bid or proposal information and source selection information, and certain planning, programing, and budgetary information.

o Issuance of a pre-award certification to be signed by contractors who are named in the investigation before they are

awarded contracts. Contractors must certify they did not receive source selection sensitive information that was not available to all competing contractors. We also developed a contract clause to recover profit if contractors falsely certify or it is subsequently discovered they did have unauthorized source selection information.

Problems With Section 27

While fully supporting the objectives of procurement integrity, we found significant problems associated with section 27 of the OFPP Act. Progress has been made in resolving, for example, the definitional problems as a result of the Committee's work last year. We are still concerned, however, that in the detailed wording of the amended law some problems remain. Among the difficulties which remain are in definitions on when the conduct of a procurement begins, who is a "procurement official", and who should be regarded as "competing contractors." Other problems with the legislation are:

o Substantial paperwork burden: The military departments reported a need for the training of and certifications from hundreds of thousands of "procurement officials."

o Section 27 contributes to a growing impression among government procurement personnel that, as a class, their integrity is in question and they are no longer trusted to exercise the responsibilities assigned to them.

The Committee's letter asked us to address the effect of Congress' suspension of section 27 of the OFPP Act. We

recognize section 27 to be one of the more significant acquisition-related statutes to have been passed in recent years. The suspension of section 27 is a positive step, providing Congress and the Executive Branch with an opportunity to resolve many of the difficult problems which arose when the Act first came into being. Current laws should, in the interim, provide adequate protection of the governments interests. For example, the offer or acceptance of a bribe or gratuity is prohibited by existing statutes and regulations, including 18 U.S.C. 201, 10 U.S.C. 2207, 5 CFR 735, and 32 CFR Part 40. In addition, there are statutory penalties associated with improperly obtaining or disclosing proprietary and procurement sensitive information. With regard to engaging in employment discussions, 18 U.S.C. 207 prohibits certain representational activities by former Government employees, including representation of a contractor before the Government in relation to any contract on which the former employee worked while employed by the Government.

Likewise, suspension of 10 U.S.C. 2397a and 2397b and 10 U.S.C. 281, concerning post-employment restrictions of DoD procurement officials with contractors, allows us to deal with the significant crimes. Personnel must continue to disqualify themselves because of the criminal prohibitions in 18 U.S.C. 208 against a Federal employee seeking employment with an entity with which he or she is conducting Government business. The criminal prohibitions in 18 U.S.C. 207 against former employees engaging in certain representational and other activities concerning matters in which he or she has participated in the

course of government service are still in effect.

We are meeting with White House Staff, Office of Management and Budget, Office of Federal Procurement Policy, Office of Government Ethics, and the Department of Justice to develop the Administration's position on a number of issues relating to the statutes that were suspended by section 507 of the Ethics Reform Act of 1989 (PL 101-194, November 30, 1989). In as much as this work has not yet been completed I am not able to present what will ultimately be the Administration's position. However, I can state that the analysis being performed by this group will result in comprehensive coverage of all elements of section 27 of the OFPP Act as well as the other suspended statutes.

This coverage should include a simplification of the post-employment statutes. I might say at this point from my personal point of view that the existing statutes are very confusing to an incoming political appointee. We must make these rules both fair and easier to understand if we are going to be able to attract good people to the government.

The group is also considering statutory coverage on trafficking in source selection information and contractor bid and proposal information; and, a standard on gratuities that will be applicable to the entire executive branch is being prepared.

Internal Control

The Federal Managers' Financial Integrity Act (FMFIA) requires the Head of each Federal Agency to provide an annual

statement of assurance to the President and the Congress that the goals of the Act are being achieved. The objective of FMFIA is to assure that programs and administrative functions are efficiently and effectively carried out and that internal management control systems emphasize prevention of waste, fraud, and abuse, as well as encourage timely correction of specific problems. The report for fiscal year 1989 disclosed 44 material weaknesses, 9 of which were related to acquisition. Each material weakness is assigned to a specific organization for corrective action and the Comptroller and I are tracking them to ensure timely corrective action. In addition, the Defense Contract Audit Agency (DCAA) performs contract audits for our contracting officers. DCAA is an separate Defense Agency and reports to the Comptroller, DoD.

Mr. Chairman, in summary, we are working actively to improve the process to ensure that taxpayers dollars are spent in a way to give real value and are protected against waste, fraud and abuse. I look forward to working with you and your colleagues on these and other important issues.

Thank you for the opportunity to appear before the Subcommittee and I shall be happy to answer any questions you may have.

LAWS RELATING TO PROTECTION OF PROPRIETARY AND PROCUREMENT SENSITIVE INFORMATION

18 U.S.C. 201	Bribery, Graft and Other Violations of Public Trust
18 U.S.C. 371	Conspiracy to Commit Offense or to Defraud United States

18 U.S.C. 641	Embezzlement and Theft: Public Money or Records
18 U.S.C. 793	Gathering, Transmitting, or Losing Defense Information
18 U.S.C. 1905	Disclosure of Confidential Information
5 U.S.C. 552 as amended	Freedom of Information Act (FOIA)
10 U.S.C. 130	Authority to Withhold from Public Disclosure Certain Technical Information
10 U.S.C. 2302	Definitions
10 U.S.C. 2320 as amended	Rights in Technical Data
10 U.S.C. 2321 as amended	Validation of Proprietary Data Restrictions
15 U.S.C. 638 as amended	Research and Development

LAWS RELATING TO BRIBES AND GRATUITIES

18 U.S.C. 201	Bribery, Graft and Other Violations of Public Trust
18 U.S.C. 203	Compensation to Members of Congress, Officers, and Others ion matters Affecting the Government
18 U.S.C. 208	Acts Affecting a Personal Financial Interest
18 U.S.C. 209	Salary of Government Officials and Employees Payable Only by United States

LAWS RELATING TO POST EMPLOYMENT LIMITATIONS

10 U.S.C. 2397(b)	Certain Former Department of Defense Procurement Officials: Limitation on Employment by Contractors
18 U.S.C. 207	Disqualification of Former Officers and Employees; Disqualification of Partners of Current Officers and Employees

18 U.S.C. 281(b)	Restrictions on retired Military Officers Regarding Certain Matters Affecting the Government
41 U.S.C. 423	Procurement Integrity
37 U.S.C. 801(b)	Restrictions on Payment to Certain Officers

Senator BINGAMAN. Thank you very much.

Before I call on Mr. Welch, let me just defer to Senator Wallop for any comment that he would have.

Senator WALLOP. Mr. Chairman, I would ask in the interest of time that my statement be put in the record and I would just say thank you to you for holding these hearings.

It is my hope that we can come to grips with some of the major inhibitions to attracting and holding good and competent and honest people. I think the point I made last year is still a point that needs to be made again, that you simply cannot, with any amount of words, keep a dishonest person from being dishonest, but you can with any amount of words make it impossible for a competent, honest person to function. I think we need to be careful to which step we go, whether it is down or up.

And I often worry that when Congress finds a problem like we found in the most recent set of scandals, Ill Wind, the laws that were then in place are the laws under which people are being tried; yet the first thing we go and do is to try to change the law. It always strikes me as odd that when we have found something functioning, that rather than accept the fact that we have competent tools to deal with these illegal mechanisms, we try to change the laws. We should look carefully and make certain that good people can still function because we can hurt ourselves more by restricting the good people than the bad people can hurt us.

Thank you.

[The prepared statement of Senator Wallop follows:]

PREPARED STATEMENT BY SENATOR MALCOLM WALLOP

Mr. Chairman, I join with you in welcoming our witnesses this afternoon. In January, the Secretary of Defense presented the first report on the implementation of the Defense Management Review called for by the President last year. If fully implemented, the recommendations of this review could result in significant savings and greatly increased efficiency in defense acquisition. I remain convinced, however, that our efforts will be in vain unless we can get the qualified people we need to serve as managers of the acquisition process.

The obstacles have been increasing. Last May, the Defense Industry and Technology Subcommittee received testimony from R. James Woolsey, a former Under Secretary of the Navy, on the serious problems created by the Procurement Integrity section of the Office of Federal Procurement Policy Reauthorization Act of 1988. Mr. Woolsey stated in his testimony that:

In my judgment, section 6, as it is presently drafted, shifts the law so heavily in the direction of ensuring that no information is transmitted improperly and that no Government official profits improperly from his Government service that it makes the system of attracting and retaining able and experienced scientific and technical people in the Government almost impossible to manage.

As a result of Mr. Woolsey's testimony and the input of other concerned parties, I am pleased to say that we were able to clarify some of the most serious definitional problems of the Procurement Integrity provisions in section 814 of the Defense Authorization Act for fiscal 1990. The Ethics legislation enacted last November went

even further and provided for the 1-year suspension of the Procurement Integrity section as well as the revolving door provisions in title 10.

As such, the suspension of a law for a period of a year accomplishes little. If no further action is taken, the legislation simply becomes effective again in November and we face the same difficulties in implementation as before. It is therefore imperative that we use this grace period to explore possible alternatives, including the repeal of the legislation suspended last year and its replacement by administrative procedures and regulations.

This hearing is a timely first step in gathering the information we need to determine the most appropriate response to this challenge. Our first panel includes Mr. John Betti, the Defense Acquisition Executive, and the acquisition managers from the three services. It is their responsibility to ensure the integrity of the acquisition process, but they also have a large stake in our ability to attract and retain qualified technical and management personnel in the acquisition work force. On the second panel, the Inspector General of the Department of Defense, Mrs. Susan Crawford, will be able to share her perspective as head of the organization chartered to conduct independent compliance audits of the acquisition system.

Senator BINGAMAN. Thank you for those opening remarks.

Let's at this point go ahead and hear from Mr. Welch, Assistant Secretary of the Air Force. If you would go ahead and summarize your statement, we would appreciate that. Thank you.

STATEMENT OF HON. JOHN J. WELCH, JR., ASSISTANT SECRETARY OF THE AIR FORCE (ACQUISITION)

Mr. WELCH. The Air Force is, in fact, very pleased to be here today, since we were here a year ago to talk about the situation on Ill Wind.

We believe that the status is as Mr. Betti summarized; that we do, in fact, need to get unified and simplified legislation that we can build simple regulations around that our people can execute and, in fact, understand and be able to explain. So, we support that which simplifies and that which we can, in fact, explain.

We would also comment that once having said that, we would ask for some time to get some stability into the process, in that the process of change has been very challenging, particularly as we pass the information down to our people, and, in fact, train them and get them to recognize it.

So, thank you for the opportunity to be here today. We certainly look forward to supporting the positions that Mr. Betti has presented.

[The prepared statement of Mr. Welch follows:]

STATEMENT OF: John J. Welch, Jr.
Assistant Secretary of the Air Force
Acquisition

SUBJECT: Ethics Reform Act and Lessons Learned

Mr Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today. As the Air Force Acquisition Executive and Senior Procurement Executive, I am responsible for the overall management and direction of the Air Force acquisition system and its policies and regulations, subject to the central policy direction of the Under Secretary of Defense for Acquisition. In this role, I have a specific interest in ethics and integrity in ensuring the Air Force has a sound and effective acquisition process with appropriate recourse to respond to problems as they arise.

Section 27 of the OFPP Act

The implementation history of Section 27 is not the model we would normally choose to follow. In late 1988 OSD and the Air Force were taking actions to address a number of policy concerns. When Section 27 was passed, we shifted our resources to assisting OFPP in implementing this new legislation. Proposed rules were published in the Federal Register, as required by law, in order to obtain public comment. As you may know, the number and complexity of such comments was great. OSD issued interim coverage in the Federal Acquisition Regulation on May 11, 1989. We also acted to educate the acquisition work force and have the specific certification required by the law signed by "procurement officials" and added to official personnel records. After operating for a few months, the provisions of

Section 27 were suspended by Section 507 of the Ethics Reform Act. We then had to stop or suspend the actions in progress and answer the many questions on solicitations and contracts issued during the short period the law was in effect. The net result was that we invested effort to address certain policy issues, shifted our resources to address Section 27, and then found it necessary to suspend the actions taken so its provisions could be reconsidered.

The Air Force strongly supports the objective of ethics legislation which would provide for uniform and easy to understand rules that can be implemented across Government. The difficulties raised by the Under Secretary of Defense for Acquisition in his statement before this subcommittee are important and raise issues that must be addressed. In the process of implementing Section 27 we observed a particular problem with the level of detail specified. For example, we believe details such as how to mark and control documents and the specific list of documents to be controlled can be better handled by DOD or Government-wide regulation rather than by statute. It is analogous to the preference for performance specifications versus detailed "How To" specifications. We prefer that you set total performance rather than specific design details.

Policy Actions Taken by the Air Force

Beginning in the spring of 1988, the Air Force worked closely with OSD and the other Services on reviews of policies and procedures and implemented interim measures in response to ILL WIND. This included Air Force support of the

DOD Task Force and my own participation with the Under Secretary of Defense for Acquisition and other Service Acquisition Executives in meeting and taking action.

For example, each Service compiled and provided to the Task Force a review of its policies and procedures for the protection, control and release of acquisition and acquisition-related information. The Air Force supported and promptly implemented the policy requiring contractors who were the subject of search warrants, or for which other official information was available, to execute a certificate of contractor business integrity and ethics and accept the profit recapture clause in their contracts. This requirement remains in effect today for competitively awarded contracts over $100,000.

The Air Force has developed a cooperative relationship with the Office of the Assistant U.S. Attorney in working on ILL WIND matters. This has been mutually beneficial both in working on the contractual aspects of the various cases and permitting us to ensure that any contract awards to contractors under investigation do not involve programs or procurements for which such contract awards would be inappropriate.

In early July 1988, there were many discussions and news stories concerning extensive use of multiple best and final offers (or BAFOs) as a possible source of compromise of the source selection process. While we found no hard empirical data supporting this allegation, in August 1988, we helped to develop increased controls that were published in the Defense Federal Acquisition Regulation Supplement and promptly implemented by the Air Force. For the Air Force, I approve the use of second or subsequent BAFOs on all executive

programs, which are major system programs or other programs of high interest to senior Air Force or OSD leadership. I have delegated this authority for formal source selections on non-executive programs to Heads of Contracting Activities without authority to redelegate. For Fiscal Year 1989 field units reported 13,409 competitive negotiated acquisitions over $25,000 with only 47 instances in which second or subsequent BAFOs were required and approved. The major (19 of 47) causes for second BAFOs were unforeseen changes in requirements or delivery schedules. We continue to get quarterly reports on the use of second BAFOs and believe they must be tightly controlled, but the ability to require a second BAFO remains an essential tool which may be required to properly accomplish an acquisition in specific circumstances. A further step which would be helpful is a change to the Competition in Contracting Act (CICA) which would permit award without discussions to other than the low offeror when a proposal is clearly superior in terms of technical approach, quality, and low risk. This would permit us to award to the best value proposal without requiring an unnecessary Best and Final Offer (BAFO).

Current Policies are Generally Sound

Air Force found that, in general, its policies are sound. Our long established source selection procedures were updated in April 1988 and are formal, rigorous and standardized to ensure fairness and proper control of information throughout the entire process. As the Acquisition Executive, I am responsible for appointment of the Source Selection Authorities for major programs. Our procedures clearly define the requirements for the marking and protection of documents and these procedures are being

followed. However, we did find some procedures should be improved. For example, we found the field implementation of certificates for signature by source selection participants was not consistent. Therefore, we have a current initiative to further refine our procedures and to implement a standard, Air Force-wide, certificate for participants in all source selections to sign. In addition, our streamlining efforts are aimed at reducing the time it takes for the Air Force to conduct its formal source selections. This saves government resources, reduces contractor proposal costs, and reduces the length of time we must protect the proceedings.

We have worked closely with OSD and other Services to improve current policies. For example, we have been working for several years to improve training, and DOD Directive 5000.52 "Career Program for Acquisition Personnel" will establish uniform DOD requirements for education, experience, and training for the acquisition workforce.

Policy Lessons From ILL WIND

In the past year or so, since the Air Force has been actively engaged with the Department of Justice and various contractors in resolving ILL WIND allegations, we have not seen evidence that gaps or confusion in either laws or regulations were a significant cause. We now know a lot about some of the ILL WIND cases, but there remains much yet to be known about the conduct of some of the firms and individuals. Based upon our current knowledge, we have not seen any instance of significant illegal or unethical activity in which the direct participants did not know that their conduct was prohibited by law or regulation.

That does not mean that clearer laws and regulations are not needed or would not be useful. However, we should

recognize that such problems were not the proximate cause of the wrongdoing. Rather, it was the desire for unfair advantage, money, or personal advancement that was the motivating force. To the degree that our current view is born out through the end of this long and difficult process, it would appear that continually improving management, leadership, ethics training, and internal checks and balances may be more of a key than more laws and regulations. I believe that large defense contractors, in general, and some of those cited in ILL WIND in particular have done much over the last few years to improve in these areas. We in the Government have recognized these needs for a long time and have emphasized proper conduct through standards of conduct regulations and training programs. However, more needs to be done, and will be done, under the ethics and streamlining initiative of the Defense Management Report (DMR).

Policy on Release of Information

The Air Force believes it is important that we protect only that information that is necessary to protect the National Security and the integrity of the acquisition process. This includes the protection of offeror's properly marked proposal information both before and after award. However, with respect to Government information, we must allow appropriate and fair access by, and interaction with, those who require the information in order to be full participants in competing for defense business. There is a danger that overmarking and establishing too many classes of information will dilute the careful marking and protection of those critical documents that truly require protection. We must protect the integrity of the source selection process, but we must allow industry to have access and know the proper

way to get access to information that will allow them to plan and participate in fair competition for the many supplies and services the government requires. In formulating our policies we must be able to acquire the systems and services to meet the national defense needs while protecting the integrity of the acquisition process.

Procurement Authorities and Responsibilities

One of the actions the Air Force took as a part of the DMR was to reexamine our procurement authorities and responsibilities in light of our new acquisition management structure which fully implements the Senior Acquisition Executive (SAE) - Program Executive Officer (PEO) - Program Director management chain. We will provide substantial additional contracting authority to the program office level and ensure appropriate decision authority at the PEO level. However, we will also ensure that expert professional contracting advice and assistance is promptly available to and used by the decision makers at key points in the process. As both the Senior Acquisition Executive and the Senior Procurement Executive (SPE), I am acutely aware of the need to optimize the mix between sound checks and balances and the ability of line managers to make timely decisions, involving judgment, as well as measurable factors. Our revised system will provide appropriate dollar thresholds which will be periodically reexamined, feedback and training to the working levels, feedback on the system to me as the SAE, and experienced, expert functional assistance in developing, but not dictating, acquisition strategies and plans.

Conclusions

We support the recommendations of the Under Secretary of Defense for Acquisition for unified and clearly written

statutes. These statutes should provide adequate flexibility to the Department of Defense to address by regulations the detailed, procedural implementation, so that changes and improvements can be made as experience warrants. Once that is done, we need to have a period of stability so we have time to implement, train, and institutionalize across the entire acquisition work force and defense industry.

Thank you for the opportunity to appear before the committee and I will be pleased to answer any questions you may have.

Senator BINGAMAN. Thank you very much.

Mr. Conver, Assistant Secretary for the Army, we are glad to have you here.

STATEMENT OF HON. STEPHEN K. CONVER, ASSISTANT SECRETARY OF THE ARMY FOR RESEARCH, DEVELOPMENT AND ACQUISITION

Mr. CONVER. Thank you, sir.

I, like Mr. Betti and my colleagues, am pleased to be here with you today to share in the discussion of this important subject.

Sir, the Army, like the Department of Defense, fully supports your efforts to bring some sense and reason into the area of procurement integrity and procurement reform. We also appreciate the efforts, of course, of your House counterparts led by Mr. Mavroules, and we have worked with them as well as with yourself.

There is absolutely no difference in our viewpoints in terms of our commitment to supporting the goals of bringing the fullest amount of procurement integrity to our deliberations. But also, Mr. Chairman, I am aware of your interest in streamlining the acquisition process and shortening the acquisition cycle, and we in the Army are concerned that we proceed with some deliberation to avoid putting into place things that might impede our mutual efforts to streamline the acquisition process and shorten the acquisition cycle.

We, in the Army, have a view on the Federal Procurement Policy Act in two parts. It strikes us that the legislation has two features. First are a series of prohibitions, and second are a series of required certifications.

With respect to the prohibitions, we do not find that there are significant differences between what is in the Federal Procurement Policy Act and prior law. There are subtle differences, but they are not substantial.

Senator BINGAMAN. You are talking about the law as it was suspended?

Mr. CONVER. Yes, sir.

We do not find that the prohibitions, as they affect the Army, are particularly more restrictive with respect to the specific provisions. Where people in the Army have had trouble with the anticipated law is in the vagueness of some of the provisions. And I guess it would be fair to say that some people in the Army, in their zeal to do what is right and proper, have perhaps overreacted because of what I would say are vague portions of it.

For example, the Army has put into place a provision which I personally believe is a very wise one that governs the visit of contractor people to Army contracting and procurement people. We require those folks to fill out some forms and go through some administrative procedures to make sure that neither we in the Army, nor they as our contractors, are violating the law. I think these are largely very sensible provisions.

Some people in the industry, however, do not necessarily understand yet the significance of these things, and they view some of the things we have done as being overly burdensome in an administrative way. And I would say, sir, we have perhaps, in the industry, a bit of a snicker factor in some of the things we are asking the contractors to do, but I think we are trying to convince them that these things are in our mutual best interest and we are trying not to overreact.

With respect to the certifications, I guess as far as the certifications go, sir, our view would be that they just simply do not help because the problem that we are trying to address is that of preventing the kinds of things that we saw in Ill Wind, the criminal behavior. I guess I would argue on behalf of the Army that the certifications do not really deter that small, very minute percentage of people who are determined to behave themselves in a criminal fashion. They do, however, impose a certain sense of criminality into the whole process. And frankly, I think it serves as a deterrent to us in our ability to seek out good people in the acquisition community, as Senator Wallop had pointed out.

We are now in the middle of trying to set up our formal Army Acquisition Corps in which we will bring both military and civilian people, the best and brightest, into the acquisition business in the Army. We find ourselves in the rather peculiar position of having to explain to them that there are provisions that could conceivably send them to jail, or give them criminal penalties, for inadvertent mistakes on their part.

Sir, that is really about it.

We have some anecdotal evidence and some statistical evidence in the formal statement that we submitted, but suffice it to say, there are some practical difficulties associated with this that none of us could have conceivably anticipated when these laws were first proposed.

One example I will give you, sir, is that we have German nationals working for us overseas who, under the laws, at one point were required to sign some certifications which they promptly and steadfastly refused to do. And again, an example of the vagueness and the resulting overreaction on our part: when the folks up at Aberdeen were asked to identify the "procurement officials" who were described in the legislation, the folks at Aberdeen submitted the names of some 1,400 people, and we felt that was a bit of an overre-

action as well. I think clearly, the Army responded well beyond what you had contemplated in the law.

So, sir, to summarize, we in the Army and we in the Defense Department, are with you in terms of the intent, and we look forward to working with you very deliberately and carefully in our mutual efforts to bring out some legislation that gets at the problem of integrity without putting unnecessary roadblocks in the way of the whole acquisition process.

[The prepared statement of Mr. Conver follows:]

STATEMENT BY

MR. STEPHEN K. CONVER

ASSISTANT SECRETARY OF THE ARMY
(RESEARCH, DEVELOPMENT AND ACQUISITION)

Mr. Chairman and Members of the Subcommittee:

I am Stephen K. Conver, Assistant Secretary of the Army for Research, Development and Acquisition. I have also been formally designated by the Secretary of the Army as the Army's Acquisition Executive and Senior Procurement Executive.

I am very pleased to have the opportunity today to provide testimony and participate in this dialogue on the impact of the suspension of the "procurement integrity" provisions of the Office of Federal Procurement Policy Act (section 27), and titles 10 and 18 of the United States Code (10 U.S.C. 2397a and 2397b, 18 U.S.C. 281), as effected by the Ethics Reform Act of 1989.

Before getting into the details of the issues I would like to reiterate the Army's enduring commitment to achieving the highest standards of integrity and ethical conduct in our business transactions in the public trust. Army senior leadership and managers at all levels fully support Congressional objectives as expressed in the various statutes treating conflicts of interest, post-employment restrictions, bribery, gratuities, release and use of "inside" information, false claims, and ethics generally. We are further dedicated to prompt and complete implementation of Executive and Defense ethics initiatives and programs including those involving our industry partners.

Our extensive and effective preventive and remedial actions to foster and ensure ethical behavior, by all Army personnel, predate the Ill Wind revelations and have been intensified since that time. Although the Army and its employees have not been

directly affected by the Ill Wind investigations, we were reminded in dramatic fashion that we cannot be complacent about our vulnerability to fraud, corruption and unethical practices. It is also quite clear that our vigilance must continue, in our training and prevention programs as well as uncovering wrongdoing and aggressively pursuing and punishing wrongdoers.

I am not an attorney nor do I pretend to be. I address you today as a Defense acquisition manager with an overall responsibility for the effective management of tens of billions of taxpayer dollars, as well as ultimate responsibility for the acquisition and contracting workforce that executes that critical mission. It is from this perspective that I report to you that the procurement integrity legislation was largely unnecessary and redundant, and, due to confusion and uncertainty as to its scope, served to disrupt contracting operations, and demoralize a predominantly honest workforce. As a minimum, these provisions should be drastically simplified and rationalized with existing legislation on ethics, employment restrictions, conflicts of interest and procurement fraud matters: focused on defining improper behavior and providing strong enforcement remedies.

We should avoid the urge to create new laws, regulations or certifications aimed at changing or punishing the behavior of a few dishonest or unethical individuals, but negatively affecting tens of thousands of honest employees and the acquisition system itself. And we can be just as prone to this practice as is the Congress.

There is a danger of complacency and overconfidence in assuming that a law, regulation or certification will prevent improper or criminal acts. There is also a tendency to focus on "technical" violations of such rules, draining resources and attention away from ferreting out the actual abuses and maintaining effective

checks and balances.

In order to prevent corruption from occurring at any level, and to gain the respect and confidence of the public, we must establish uniform "corporate" ethics programs, standards and responsibilities, in Government and industry; and, just as importantly, a system of standards of conduct and management policy and example that fosters individual integrity and accountability in an aware work force. We must collectively realize that such pervasive ethics programs are not of the "set and forget" variety, but require constant dedication and vigilance. My own experience convinces me that this does not entail a large scale "culture" shift, but a demonstration of seriousness of purpose to the unscrupulous few, and a clarification of the shared standards that are critical to the success of any viable ethical system.

I am convinced that the Congress, President Bush and Secretary Cheney have demonstrated a commitment and plan of action for just such systems as reflected by: the Ethics Reform Act of 1989; Executive Order 12674; the charter for the Office of Government Ethics; the DoD Ethics Program and the actions of the DoD Ethics Council; and the ongoing implementation of the Defense Management Report at all levels of the Department of Defense, including industry voluntary self-governance and disclosure programs.

Within the Army we have instituted a number of systemic management actions that complement and augment this programmatic approach to ethics reform and fraud abatement, including Secretary Jack Marsh's Army Fraud, Waste and Abuse Task Force, established in 1986; the Procurement Fraud Division of The Judge Advocate General's Office; the Fraud Awareness Program and the establishment of Fraud Advisors and Ethics Counselors in all Army organizations; as well as vigorous ethics programs in all

of our Major Commands. I am most pleased by the effective cross-training, coordination, cooperation, and information sharing that exists between our auditors, inspectors, criminal investigators and the procurement and legal communities at all levels of the Army.

The consensus in the Army, however, is that the suspension of the procurement integrity legislation has had no substantive negative effect on our procurement operations, our ability to ensure proper behavior in contracting transactions, or our identification and pursuit of wrongdoers. The suspension has in fact had a positive effect on Government-industry relations, a removal of a cloud of confusion, suspicion and outright paranoia, not conducive to effective procurement operations, as well as the lifting of significant administrative burdens with little perceived value.

The integrity legislation was viewed as a class indictment of the acquisition community, a presumption of guilt until proved (or certified) as innocent. In addition to the discriminatory post-employment restrictions, which were somewhat ameliorated by your efforts through the FY90 DoD Authorization Act amendments, there was a general stifling of communication between Government and industry which was very harmful to the effective execution of the normal procurement process. I will admit that some of this may have been self-imposed overreaction, but can you fault Federal and industry acquisition and legal personnel for being conservative in implementing vague language with large potential penalties for mistakes in interpretation or judgment, especially in the current environment.

Let me give you some examples of the reactions to this legislation. One large corporation had cards printed up for use by their employees any time they had a discussion with Government personnel. The cards contained a number of

questions, designed in part to assure that personnel did not inadvertently break the law, or put the corporation or the Government employee in a compromising situation. This practice brings to mind the Miranda-rights cards that law enforcement officers carry.

Other firms advised their program managers and marketing people not to hold discussions with Government personnel until checking on their status with the cognizant ethics counselor. Army contracting officials complained that they could not meet or hold discussions with their industry counterparts without a lawyer present. Perhaps most illustrative of the significant practical effect of this legislation is the situation of our overseas contracting activities, particularly in the European theatre. In their contracting operations, these activities must comply with and enforce not only most of the statutes and regulations applicable to U.S. based procurement, but they must also respect issues of sovereignty and local laws and commercial practices pursuant to varying international agreements. Overseas activities also rely heavily on the services of loyal and dedicated local national procurement personnel who provide necessary continuity as well as invaluable language, cultural and economic insights. The certifications and reporting required by the procurement integrity legislation and regulations were decried and rejected by foreign governments and their contractors as repugnant to their sovereignty and an improper intrusion into their corporate management under their own national laws.

In Germany, many U.S. Army local national employees not totally subject to U.S. law refused to sign the procurement integrity certificate as an affront to their personal integrity, comparing the reporting requirements to pre-war mandates to turn-in one's neighbors.

Although I do not believe that Congress envisioned such consequences, they are representative of the difficulties experienced in implementation. This is due, in large part, to the extreme diversity and global nature of the Defense mission and attendant Army procurement responsibilities worldwide.

I would like to now discuss some of the Army's efforts to uncover and prevent fraud, waste and abuse in acquisition and contracting, many pre-dating the Ill Wind revelations, and our success in vigorously prosecuting offenders under statutory authorities other than the procurement integrity provisions.

DETECTION/CORRECTION OF FRAUD, WASTE AND ABUSE

As I mentioned earlier, the Army has a veritable arsenal of tools in the fight against fraud, waste and abuse in procurement-related operations and management. But as much as our statistics reflect the success of our vigorous detection and prosecution efforts, I am still more pleased to report on our management of the results of such investigations, and the corrective actions taken to prevent recurrence. First, however, I would like to give you some perspective of the magnitude of the Army's procurement fraud detection program.

Since December 1987 we have achieved 99 indictments and 127 convictions, and have gained for the Treasury over $40,000,000 in criminal fines and restitution. In its prosecution of Army cases the Department of Justice's Civil Division has achieved more than $89,000,000 in civil recoveries, and the Army's own Procurement Fraud Division (PFD) recovered another $5,000,000. In 1985, prior to creating the Army Task Force on Fraud, Waste and Abuse, the Army suspended 66 contractors and debarred 116 contractors, and entered into 8 settlements. By comparison, in the last two calendar years we suspended 339 contractors and debarred 304 contractors, and entered into 120 settlement agreements. The Army is currently enforcing 156 settlements,

all of which include extensive self-governance programs. Presently, the PFD has primary responsibility for 663 primary active cases, involving an additional 298 affiliated companies and individuals. During the last two years we also completed or closed 969 cases.

I am particularly pleased to report that we are managing 31 active cases initiated under the expanded Qui Tam authority, and 11 cases resulting from contractor voluntary disclosure. I am confident that increased experience and interagency cooperation, and a few clear successes, will encourage more of these disclosures and simplify their disposition. The increase in the number of fraud cases and administrative violations uncovered does not indicate a crime wave, in my opinion, but reflects the results of enhanced awareness and identification, and the resources and will to pursue these cases.

At the highest levels of the Army, the Fraud, Waste and Abuse Task Force can identify the "big picture" policy, regulation, organizational or legislative fixes required. I serve as the chairman of the Task Force. The Assistant Secretary of the Army (Financial Management), the Commander, Criminal Investigation Command, The Inspector General, The Auditor General, the General Counsel and The Judge Advocate General, serve as permanent members. The Task Force is supported by a Permanent Work Group composed of other senior Army leaders and managers.

As an example of the type of management action resulting from the deliberations of the Task Force, the Army's Procurement Fraud Division and Procurement Fraud Awareness Program were instituted by the Task Force to achieve more comprehensive remedial action on a larger number of cases and to facilitate HQDA visibility. In each case involving fraud, remedies plans are required at each command level to address systemic "fixes"

and procedures that would serve to prevent recurrence of the fraud, waste, or abuse in the future. These remedies plans are also routinely reviewed by PFD.

The Procurement Fraud Division, under the direction of The Judge Advocate General, is a unique operational organization among the Military departments, responsible for coordinating all criminal, civil, administrative, and contractual aspects of our remedial actions. The Procurement Fraud Division (PFD) monitors all investigations, including so-called small dollar cases, to watch for trends and systemic problems, requiring policy or regulatory changes or clarifications, or other management action. The PFD also separately manages any alleged corruption case involving conflict of interest, gratuities, bribery, post-employment violations, etc., for special prosecution and remedial emphasis, regardless of dollar value. The PFD reports their findings and recommendations to the Army Task Force.

A recent example is the intensive review of the National Guard Bureau's procurement organization, management and practices resulting from the investigation and conviction of an NGB military officer for accepting gratuities. In the investigation by PFD, other contracting irregularities were discovered. Although many of these irregularities were determined not fraudulent, the potential for abuses required management review and remedial action, which has been initiated.

The majority of Army cases are begun through the coordinated efforts of our contracting officers and other procurement personnel, the Army internal review system, the Army Audit Agency, and Army Inspectors General providing information to the Criminal Investigation Command and the Procurement Fraud Division. There has been a dramatic increase in fraud awareness particularly among the acquisition community and a resulting increase in identification and pursuit of these cases.

At the Major Command level, U.S. Army Europe established the USAREUR Remedies and Performance in Contracting Committee (modeled after the Army Task Force) that reports directly to the Deputy Commander in Chief, USAREUR. Its members include high level USAREUR staff and commanders, as well as the IG,DoD (Europe).

The USAREUR Committee regularly reviews the progress of significant fraud cases, helps bring command emphasis to cut through "red tape" roadblocks to effective action, and helps identify and implement systemic corrective and preventive action. The Committee recently recommended and monitored the implementation of a complete overhaul of procedures for the selection, training, appointment and evaluation of Contracting Officer's Representatives (COR's) at all Army activities in Europe. This action was taken in response to identification of a trend in a number of cases that revealed that poorly performing COR's were a major recurring factor contributing to an inability to prevent fraud and waste.

As a result of these and other efforts and management action throughout the Army, we are intensifying our ethics program enhancement and fraud abatement efforts based on progressively increased knowledge and awareness and successes in prosecuting cases. Some of these "building block" cases are as follows:

SIGNIFICANT INVESTIGATIONS/CASES

1. In a 1988 settlement of matters (primarily cost mischarging) arising out of a Grand Jury investigation in which the U.S. Army Criminal Investigation Command was the principal investigation agency, the Government recovered $67,932,000 in cash from a major aircraft corporation. In addition, the Government received other contract concessions and dismissal of contract claims. Under the terms of the settlement agreement,

the firm instituted extensive ethics and self-governance programs monitored by the Army. As part of the resolution, the Department of Justice declined criminal prosecution and waived civil claims. This case was significant not only because of its magnitude but because of the intergovernmental cooperation and the application of the industry self-governance and voluntary cooperation aspects.

2. A long term investigation of Cubic Corporation by the Criminal Investigation Command resulted in settlement of a case involving falsification of first article test data under a mine detector contract. The comprehensive negotiated settlement resulted in Cubic's agreement to: pay the Government $7,250,000 pursuant to a civil fraud consent judgment; dismiss over $3,000,000 in contract claims, and institute comprehensive ethics and self-governance programs monitored by the Army.

The U.S. Attorney in San Diego also indicted two Cubic employees responsible for the falsification of test data. This case is significant in part due to the multiple existing statutory remedy forums that were used effectively.

3. The Army has taken the Federal lead in combatting fraud schemes involving individual surety bonding. All Federal contracting agencies are potentially affected by such schemes. The Criminal Investigation Command and the U.S. Army Corps of Engineers act as a clearinghouse for tracking the various investigations around the country that are being conducted by many different law enforcement agencies. The Army's Procurement Fraud Division of the Judge Advocate General's Office provided an attorney to assist in the prosecution of the first successful conviction resulting in a nine year jail sentence for Gwendolyn Joseph. The Army has suspended or debarred twenty one firms and individuals and the General Services Administration has suspended or debarred eight others based on information

developed to date. We continue to monitor another twenty five cases involving more than 120 firms or individuals that are still under investigation. This class of cases is significant to me because it dramatically demonstrates our ability to cooperate and coordinate our investigation efforts not only within DoD but throughout all Federal agencies in our common effort to protect the Government's interests.

One example of regulatory change that resulted from our investigation efforts is the recently issued Federal Acquisition Regulation coverage tightening up the controls on the use and acceptability of individual surety bonding.

The Army has also worked closely with the Office of Secretary of Defense and other Federal agencies on developing practical and effective rules for government-wide suspension, debarment and ineligibility, currently implemented in the Federal Acquisition Regulation. We extensively updated our standards of conduct regulation (AR 600-50) in January 1988, to beef up guidance on the use of inside information, gifts and gratuities, employee disqualifications (recusals), centralized reporting of all procurement-related violations to HQDA, and post-employment restrictions and reporting. Another revision will be made to reflect the results of the Office of Government Ethics' Government-wide ethics program and standards.

Guidance on controlling the use of potentially abusive multiple "best and final offers" has been promulgated under the FAR System. Reports to date reflect an enhanced awareness of the dangers inherent in usage of multiple BAFOs, as well as a near elimination of the practice.

The foregoing leads me to make a few points on the Defense Management Report (DMR), and the monumental efforts of implementing that pervasive improvement plan of action. In the DMR implementation process, DoD is taking effective action on

systemic weaknesses uncovered by our intensive management review following the Ill Wind revelations. The DMR emphasizes the following actions, particularly relevant to this discussion:

o DoD's commitment to vigorous enforcement of all applicable laws to uncover and prosecute anyone involved in the acquisition process that is guilty of illegal or unethical behavior.

o DoD's enduring commitment to the President's uniform, consistent and reasonable Government-wide ethics program focused on personal integrity and accountability; understandable in scope, straightforward and simple in concept, and clear in application and enforcement.

o Greater accountability in industry through implementation of corporate codes of conduct and voluntary self-governance and disclosure programs.

o A commitment to emphasizing quality in our dealings with industry, and to adopting to the extent possible commercial type practices and greater reliance on commercially-available products. These initiatives will require some statutory relief as well as a "culture" change in our traditional buying practices.

o Perhaps most significant of all DMR initiatives is the systematic and planned professionalism of our military and civilian acquisition workforce. More than any new laws or rules, it is the quality of individual employees carrying out the mission and function that will make the difference in the years ahead. For example, we have already taken significant steps to improve the manner in which the Army manages its officer personnel who choose a career in acquisition, and have likewise developed a system to identify, develop, and promote our civilian acquisition professionals.

I strongly support the DoD legislative and Executive

proposals that would give the Secretary of Defense more authority to hire, develop, motivate and retain the highest caliber military and civilian employees available to manage and carry out our critical acquisition responsibilities. As the proponent for the Army's Acquisition Corps I am heartened by the renewed focus and resourced emphasis on these historic reforms, and, with your help, I am dedicated to making them a success.

In addition to the initiatives contained in the comprehensive legislative package to implement the findings of the DMR, massive organizational, budgetary and regulatory streamlining efforts are under way throughout the Department. The Army is actively participating in the DoD efforts to streamline our acquisition and procurement organizations, processes and structures.

Total Quality Management (TQM) initiatives in all of our operations hold great promise. As with a viable and vibrant ethics program, TQM requires the unreserved commitment and day-to-day example of top leaders and managers and an attitude and culture that accepts and fosters the notion that we can and must continuously improve, seeking, as we say in the modern Army, to "be all you can be".

To the extent that industry has been slow to adopt voluntary ethics and self-governance programs, it has been our perception that they are uncomfortable with the legal aspects of voluntary disclosure tenets. I believe that if we are successful in reporting the constructive settlements resulting from voluntary disclosure and cooperation on remedial action, we will see a marked increase in adoption of these programs. A few large corporations that have established corporate ethics programs, have balked at adopting the principles of voluntary disclosure, particularly as called for under the Defense Industry Initiative (DII). It is our position that prompt

voluntary disclosure of improper or criminal activity discovered (by any means) within a law abiding corporation, is an essential element of any responsible self-governance program.

Our lawyers and those in the other Services advise that the Grand Jury secrecy restrictions, spelled out in part in the rules of criminal procedure in title 18 of the U.S. Code, have caused some very real problems in gaining information for the prosecution of ongoing cases and for making critical business decisions regarding contractor responsibility, especially on major procurement actions.

We are continuing to work very closely with DoD and the Office of Federal Procurement Policy to develop clear new rules on identification and disclosure of marketing type consultants and consultant conflict of interest guidelines.

Overall, I am concerned that the acquisition process, particularly within DoD, is subject to over 4,000 laws, and a plethora of implementing regulations, many issued by agencies outside of the Department, that have a direct and often very costly impact on the way we contract for goods, services and construction. Piecemeal procurement reform legislation, codifying everything from our commercial contract cost principles to detailed software and data rights guidelines, too often overlaps, conveys conflicting goals and objectives, and in general adds little to improving everyday business decisions or management of the contracting process. Well intended, these special purpose laws have become an accretive minefield for our program managers, contracting officers and lawyers as they try to exercise their professional mandate to acquire the best overall value in needed supplies and services to support our troops and the Army and Defense mission. We pay a very high

price in personnel and process inefficiencies, non-value added paperwork, and absolute confusion, for "how to" legislation that does not provide the Secretary the discretionary authority to discriminate and manage effectively.

Senator BINGAMAN. Thank you very much.

Mr. Beach, why don't you go ahead with your testimony?

STATEMENT OF CHESTER PAUL BEACH, JR., PRINCIPAL DEPUTY GENERAL COUNSEL AND DIRECTOR, PROCUREMENT TASK FORCE, U.S. DEPARTMENT OF THE NAVY

Mr. BEACH. Thank you, Mr. Chairman, Senator Wallop.

On behalf of Secretary Garrett, I am certainly pleased to join Secretary Betti, Secretary Welch and Secretary Conver today to discuss these important issues with you. And I certainly agree and support everything that has been said by my colleagues to this point.

My written statement, submitted for the record, describes in some detail the principal management tools that we use within the Department of the Navy to prevent, detect and respond to instances of fraud, waste and abuse in our programs. It describes the lessons we have learned and the actions that we have taken in response to the Ill Wind Investigation and our assessment of the relationship between those lessons and the provisions of the OFPP Act and title 10, which are presently in suspension.

For just a moment, I would like to summarize, if I may, the principal lessons learned which we believe bear upon the future of the suspended provisions of law.

First, the fundamental lesson of Ill Wind to date is that certain individuals both within our acquisition system and in the private sector made conscious, knowing decisions to break existing laws to gain unfair advantages in the awarding of Government contracts. The prosecutions and convictions arising from Ill Wind are the result of conscious criminality, not uncertainty regarding the limits of permissible behavior either on the part of our employees or those outside the Government.

Second, existing provisions of law have been sufficient to enable us to prosecute and punish the misconduct thus far revealed. Although the suspended provisions of law might have furnished an additional basis for prosecution in certain cases, the same misconduct which they would have reached was prosecuted successfully under existing law. We have provided our analysis on that point to the subcommittee staff in some detail.

Third, our review of the information emerging from the investigation has suggested a number of ways in which we might reduce the vulnerability of our procurement process to attack by unscrupulous individuals. We have worked with the Department of Defense to address those vulnerabilities which warrant solution at that level, and under Secretary Garrett's leadership, we have addressed others as management issues within the Department of the Navy. We will certainly continue these efforts as additional infor-

mation emerges, recognizing that there is no management action which can ensure the virtue of individuals.

As we consider the future of the suspended procurement integrity provisions, these lessons suggest that those provisions are not necessary to protect the Government's interest, a point which is demonstrated by our experience since they were first enacted and amended.

We must also realize that those provisions were designed to address a perceived uncertainty in the law, and do not directly operate to prevent illegal conduct by those who are intent on committing it. Our experience does not establish that any such uncertainties have resulted in damage to the integrity of the procurement process. Moreover, our experience with the suspended provisions of law, during the short time that they were in effect, revealed a number of administrative and practical problems which are described in my written statement and the statements of my colleagues.

Most importantly, they were and continue to be perceived by our employees as evidencing a lack of trust. That is fundamentally unfair to our employees, the overwhelming majority of whom perform their duties with uncommon dedication and ability for compensation which, apart from the inherent satisfactions of public service, is not competitive and is often inadequate to the responsibility that we give them. It is also counterproductive to our efforts as managers, as Senator Wallop indicated, to attract and retain the high quality men and women who are essential to the future of our acquisition system. Nor, I might add, do these provisions support our efforts to improve the too adversarial nature of the relationship between the Department and its suppliers.

Because we believe these provisions to be unnecessary and counterproductive, we in the Department of the Navy fully support Secretary Betti in the hope that they will not be reinstated in their present form at the end of the suspension period, and we fully support the efforts of the interagency working group he described in his written statement to develop a positive alternative for your consideration.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Beach follows:]

STATEMENT OF

CHESTER PAUL BEACH, JR.

PRINCIPAL DEPUTY GENERAL COUNSEL

AND

DIRECTOR, PROCUREMENT TASK FORCE

DEPARTMENT OF THE NAVY

Mr. Chairman, members of the Subcommittee:

On behalf of Secretary Garrett, I am pleased to join Under Secretary Betti and the other distinguished representatives of the Department of Defense and the Military Departments this afternoon.

In June 1988, immediately following public disclosure of the "Ill Wind" investigation, then-Under Secretary Garrett established the Department of the Navy Procurement Task Force to support his direction, coordination and oversight of our response to the information emerging from the investigation -- particularly with respect to its implications for management of our procurement system. I have served as Director of the Task Force since its inception.

In responding to the issues raised in the Subcommittee's letter of invitation, my testimony will focus upon the actions we have taken and are taking within the Navy and Marine Corps to combat fraud, waste and abuse; the particular lessons learned from and actions taken in response to information arising from the "Ill Wind' investigation; and their relationship to the presently suspended provisions of section 27 of the Office of Federal Procurement Policy Act, sections 2397a and 2397b of Title 10, and section 281 of title 18, United States Code.

The Fight Against Fraud, Waste and Abuse in Department of the Navy Programs

Preventing, detecting and deterring fraud, waste and abuse in Department of the Navy programs is, first and foremost, a personal responsibility of leaders and managers at every level. Key to the fulfillment of this responsibility is a clear, direct and unambiguous line of authority and responsibility, and clear, simple standards which leaders and managers can enforce.

As the the Deputy Inspector General of the Department of Defense testified before this Subcommittee last May, many acquisition problems are caused by noncompliance with regulations, inattention or misjudgment, rather than faulty or unrealistic policies and procedures.

> Human errors of omission or commission are far more prevalent when the personnel management system is too cumbersome and inflexible, when pay is not competitive with rival economic sectors and organizations, when spheres of authority are poorly defined and there is duplicative organizational effort, when training is not adequately emphasized, when recruitment and retention of high quality personnel is difficult, and when morale is not optimum. Audits and inspections have confirmed that these kinds of workforce problems exist to various degrees in a large number of DoD organizations, especially among those performing such crucial acquisition tasks as contract administration, quality assurance, property management, and contracting.

[S. Hrg. 101-251, Pt. 7, Pg. 105]

At Secretary Garrett's direction, the Department of the Navy's initial implementation of the Defense Management Report aggressively addresses a number of these factors which are conducive to inefficiency and poor performance. Specifically, we are:

(a) Enhancing and clarifying authority and responsibility within our acquisition system, through establishment of a

single Assistant Secretary for Research, Development and Acquisition, and a shortened chain of command for program managers. We are also eliminating duplicative pre-execution oversight of acquisition plans and business clearances, limiting the influence of special interest advocates, and pushing substantial decision authority down to Program Executive Officers (PEOs), who will serve as first line supervisors for Program Managers of certain major programs and related non-major programs and will have no other responsibilities.

(b) Improving the overall quality of the Navy's Acquisition Workforce by:

(1) Substantially changing our military officer Material Professional and Acquisition Management Officer Programs in the Navy and Marine Corps, respectively, to provide for early selection, advanced education and intensive management of officers to be eligible to fill key acquisition positions, such as Major Program Managers, Program Executive Officers, and Commanders of Systems Commands.

(2) Substantially strengthening our Civilian Material Professional (CMP) Program. Commands are required to identify their key acquisition positions and then to fill them only with CMP-certified employees. Commands are also required to establish advanced development programs for selected CMP-certified employees, to qualify them for potential selection to the most senior acquisition management positions, including Major Program Managers and Program Executive Officers.

(c) Developing, under the auspices of the DoD Ethics

Council, a uniform ethics training curriculum, including an ethics handbook for all employees, and mandatory initial, periodic refresher and exit training requirements.

The other two impediments to optimum performance noted by the Deputy Inspector General -- our cumbersome and inflexible personnel management system and our noncompetitive salary structure -- require solution on a broader basis. Mr. Chairman, we recognize and appreciate your leadership in these matters during the past several years, and look forward to working with you and all interested members to secure favorable consideration of civilian personnel system management and compensation enhancements. They are essential to our common goal of a well-trained and motivated, highly capable and ethically sound acquisition workforce.

In addition to our efforts to improve our line management structure, the Department of the Navy also maintains a full-time, top-level Procurement Management Review Team on the staff of the Assistant Secretary of the Navy (Research, Development & Acquisition) to review periodically each of the Navy's Systems Commands and other major buying activities. These reviews assess the activities' level of compliance with applicable procurement policies and procedures, as well as the effectiveness and efficiency of their overall procurement function. The Systems Commands, in turn, each have similar teams at their headquarters, and in some cases at lower levels, to conduct reviews on their subordinate activities with procurement responsibilities.

Activities whose procurement functions are found to be less than acceptable either lose their procurement authority altogether or have their authority to award contracts restricted

to those of a specified type and/or dollar amount. These activities regain their procurement authority only after they demonstrate that they have adequately corrected the deficiencies that were noted during the review. Activities that are found to be performing their procurement functions acceptably also are required to implement recommendations generally aimed at improving the overall quality and effectiveness of their procurement efforts.

These direct management review efforts are furthered by the investigative efforts of the Naval Investigative Service (NIS) and the investigation and inspection services provided by the Navy Inspector General (NIG).

NIS has significantly increased its efforts in the fraud arena over the last four years:

- In 1986, NIS established a Fraud Department at Headquarters reporting directly to the Director of Criminal Investigations.

- In September 1987, six Regional Fraud Units were established where agents are dedicated to the conduct of fraud investigations.

- The number of fraud investigation billets have been increased from about 140 in 1986 to about 180 in 1989, despite increasing constraints on available resources.

- Between 1986 and 1989, and excluding results to date on the "Ill Wind" investigation, NIS fraud investigations resulted in 506 convictions and $239 million in fines, recoveries, and restitution.

- To improve coordination, NIS agents have been assigned to the staff of the Naval Inspector General, the Navy Debarment Committee, and the Defense Procurement Fraud Unit (DPFU) of the Department of Justice.

- The number of fraud awareness briefings given to Department of the Navy employees by NIS agents has increased by 55% since 1988. In 1989, some 464 briefings were presented to over 13,800 Department employees.

The Office of the Naval Inspector General (NIG) has also significantly increased its efforts in the area of fraud:

- NIG has been reorganized to enhance efforts to prevent procurement fraud. An Acquisition Command Inspection Division has been created. This Division is now conducting inspections of the Navy's five Systems Commands on an 18-month cycle rather than the previous 36-month cycle. As a means of identifying potential investigation issues at each Command, NIG is performing a search of various data bases, which contain information concerning other reviews or criminal investigations pertaining to the Command. Inspections now emphasize such topics as protection of acquisition information, use of consultants and contractor support services, training of contracting officers' technical representatives, and ethics training.

- A Procurement Fraud Division has also been created. The number of fraud cases completed grew from 204 in 1988 to 351 in 1989. This Division has improved coordination with NIS. It also has increased the emphasis on developing well-coordinated and appropriate remedies plans for cases of

fraud involving Navy programs.

- NIG has increased its audit follow-up efforts. NIG has begun conducting special procurement investigations in response to hotline calls or other reports of potential procurement fraud.

These efforts to identify needed improvements are complemented by those of our financial management community. Pursuant to the Federal Managers Financial Integrity Act, 31 U.S.C. Section 3512, the Navy annually reviews its internal accounting and administrative controls and identifies any material weaknesses and its plans and schedules for correcting such weaknesses. Over the last two years the Navy has identified and taken action to correct several weaknesses in the area of procurement and contract administration which could have contributed to fraud, waste and abuse in our acquisition system. For example, we have taken steps to ensure that contractor taskings under engineering support services contracts are adequately documented and that estimated manhours and rates are in general agreement with the overall contract. We are also taking steps to improve our management of contracting actions under interagency agreements.

Industry, of course, must also take responsibility for ensuring integrity on its side of the customer-supplier relationship. We fully support the Defense Management Report's emphasis on contractor self-governance, including voluntary disclosure and utilization of the Contractor Risk Assessment Guide.

Operation "Ill Wind:"
Lessons Learned and Actions Taken

As this Subcommittee is well aware, the ongoing NIS/Justice Department investigation known as Operation "Ill Wind" has been well publicized. For the record, it began in response to a hotline phone call from a concerned employee of a support services contractor to the Naval Investigative Service (NIS). This individual had been a former employee of the Department of the Navy (DON) and at one time had attended a fraud awareness briefing given by the NIS. As a result, he knew that NIS was an appropriate activity to contact in connection with suspected fraud involving a DON acquisition.

To date four companies, three government employees (all now separated from the Government) and twenty-seven other individuals have been convicted for activities uncovered by the "Ill Wind" investigation. Two individuals who went to trial were acquitted on all charges.

Although there have been convictions for other violations, in general the nature of the wrongdoing that has been exposed by "Ill Wind" which is susceptible to a Departmental response has been of two types: illegal disclosure of source selection sensitive information; and the exercise of illegal influence by Government employees to benefit contractors in the award or administration of Government contracts. Charges have been based primarily on conspiracy to defraud, convert, or bribe; bribery; wire fraud; and theft and/or conversion of Government property.

The primary lesson learned thus far from the investigation is that the conduct prosecuted has been conscious, deliberate and, in some instances, highly sophisticated criminal conduct.

The best response to such premeditated wrongdoing must continue to be aggressive investigation, administrative action and prosecution. Nonetheless, as information has emerged from the investigation, Secretary Garrett has directed a number of internal management actions to reduce opportunities for misconduct, and we have worked with OSD and the other Military Departments to develop appropriate DoD-wide actions. Specifically,

- We have worked with OSD to develop a DOD Directive that will provide uniform guidance regarding the releasability of acquisition documents and information.

- Also in order to reduce the potential value of source selection sensitive information, particularly information concerning competitive proposal evaluations, the DFARS was revised to require high level approval prior to use of more than one request for Best and Final Offers (BAFOs). In implementing the DFARS requirement, Secretary Garrett elected not to delegate his approval authority for multiple BAFOs on major programs. As a result, multiple BAFOs can be used on major programs in the Navy only with the approval of the Secretary. This authority will be transferred to the newly established Assistant Secretary (Research, Development and Acquisition) in his capacity as Navy Acquisition Executive.

- In 1988, then-Under Secretary Garrett directed our buying activities to eliminate on a phased basis their use of support service contractors in sensitive stages of the procurement process. Not only will this give us more control over the individuals who have access to source selection sensitive information, but it will also ensure

that we retain adequate internal Navy resources to perform our basic governmental functions. Implementation of this initiative is on track and proceeding well.

- The Navy developed a prototype training package, including an ethics handbook, for a standardized curriculum in ethics training. This package has been provided to OSD, for consideration in the DoD Ethics Council's efforts to develop a uniform ethics training package for all DOD components.

- As mentioned above, the Naval Investigative Service (NIS) has increased the number of fraud awareness briefings that it gives to Navy activities to make Navy employees aware of potential situations involving fraud. In addition, plans are being made to assign NIS agents to our Systems Command Headquarters to increase our emphasis on fraud awareness and investigate allegations of potential fraud in the procurement process.

- We reviewed our competitive source selection procedures in general and are making the following changes:

  -- Contracting activities will be precluded from assigning a numerical score to price when numerical scoring is used to rank technical proposals. This change will help focus the source selection decision or the substantive technical differences between the offerors and the relative costs, rather than on total point scores.

  -- The use of non-governmental personnel in the competitive source selection evaluation process will be

prohibited.

-- Contracting officers will be required to include in their debriefings of unsuccessful offerors a discussion of the results of cost realism analyses and their effects on evaluated costs.

"Ill Wind" and Suspended Provisions of the Procurement Integrity Act

Clearly, key prohibitions set forth in the Procurement Integrity Act regarding (i) the giving and receiving of money, gratuities, or other things of value by competing contractors and procurement officials, and (ii) the disclosure or receipt of proprietary or source selection information were intended, in part, to address problems that surfaced during the Ill Wind investigation. To assess how useful the Procurement Integrity Act might have been for prosecutions under the Ill Wind investigation, we reviewed all of the documents released with each of the thirty-one plea agreements and the two indictments to date to determine whether charges also could have been brought pursuant to the criminal provisions of the Procurement Integrity Act (Section 27(i) of the Office of Federal Procurement Policy Act as amended) if those provisions had been in effect at the time. The criminal prohibitions established by that section pertain to the disclosure of proprietary or source selection information. We concluded that in a number of instances additional charges could have been brought, had the OFPP Act amendments been in effect. However, in each such instance a felony conviction for the same misconduct was obtained on another statutory basis (e.g., conversion of Government property, wire fraud, bribery). It appears to us that generally if an individual or entity could be charged with

a violation of Section 27(i), the individual or entity also could be charged with an 18 U.S.C. 641 theft and/or conversion of Government property violation or, if a Government employee was paid in some fashion for providing the information, an 18 U.S.C. 201 bribery violation. We specifically found that charges under the Procurement Integrity Act could not have been brought against the two individuals who were acquitted at trial.

We also reviewed all of the publicly released information pertaining to the Ill Wind investigation to determine if there were any apparent instances in which Government employees would have violated the post-employment restrictions imposed on Government employees by section 27(e) of the Procurement Integrity Act if that restriction had been in place during the time of the events that were the subject of the Ill Wind investigation. Although the section 27(e) post-employment restrictions are not subject to criminal penalties, they are subject to civil penalties. We found no evidence that any of the individuals who have been indicted or have pleaded guilty would have violated the Act's post-employment restrictions. There is information included in one corporation's plea agreement asserting that a former Navy official participated in behind the scenes negotiation activities on behalf of the corporation in connection with a program in which he had personally and substantially participated while a Navy employee. Under the basic conflict of interest statute, 18 U.S.C. § 208, such participation would not have been prohibited, but it might have been prohibited under the Procurement Integrity Act, had it been in effect. The former employee concerned has not as yet been the subject of any judicial proceedings. In any event, our experience to date in the Ill Wind investigation indicates few, if any, apparent instances in which Government employees left Government service and went to work for a company that was either competing for or had been awarded a contract resulting

from a procurement with which the former Government employee had been personally and substantially involved.

Navy buying activities faced several problems concerning the Procurement Integrity Act and its implementation in the FAR during the period immediately before and after its effective date last July. Among them were:

- Certain contractors in sole source procurements refused to sign certificates. This issue was resolved only when the Act was suspended.

- To avoid potential statutory violations, some contracting officials determined that they could no longer discuss planned procurements with contractors, including sole source contractors, prior to formal issuance of a solicitation or approval of a J&A. The effects of this included:

  -- Sole source contractors, who in the past accommodated the Government's schedule requirements by beginning their proposal preparation efforts in advance of a solicitation, were less inclined or able to do so because they were unable to obtain needed information informally.

  -- A reduction in valuable dialogue between the Government and industry regarding the feasibility of upcoming procurements and ways to improve them.

- Because of concerns about post-employment prohibitions and the way that companies would interpret who a "procurement official" is, some employees of Navy laboratories declined to assume responsibility for monitoring contractor

performance for contracts awarded by other Navy activities which related to their own R&D efforts.

- A French Government-owned ship repair facility in Toulon, France refused to certify prior to award of a contract for an overhaul of Belknap, the flagship of the Sixth Fleet. Eventually, the Under Secretary of the Navy, as acting Secretary of the Navy, signed a waiver of the certification requirement pursuant to subsection 27(d)(7)(B) of the Act.

It is anticipated that there will be many additional problems in attempting to get certificates from foreign governments and foreign nationals. This is particularly true in situations in which the foreign government or its employees will be deemed to be "procurement officials," as for example, when an agency of the foreign government audits proposals for us or when foreign nationals work in our overseas procurement offices under a master labor agreement between the U.S. Government and the government of the country involved.

Another element of concern noted throughout our procurement system prior to the suspension of the Procurement Integrity Act provisions is the resource and administrative burden of providing training and obtaining and maintaining the requisite certificates from the many thousands of individuals likely to be "procurement officials" under its terms. Finally, I would be remiss if I did not report the concern expressed by many of our procurement personnel that such legislation impliedly questions their integrity as public servants and evidences a lack of trust in them as a class. Such impressions do not contribute to efforts to enhance the quality and prestige of the Federal service.

Conclusion

Mr. Chairman, the Department of the Navy has taken vigorous, yet careful action to ensure the integrity of the Department's procurement process, both during the pendency of the Ill Wind investigation and for the future. We fully recognize that as we seek to streamline the exercise of authority in our system, we must do so in a manner which ensures and enhances accountability and fosters excellent performance. We fully support ongoing efforts of the Office of the Secretary of Defense, the Administration and the Congress to develop uniform, consistent, fair and easily understood standards to guide our personnel.

Senator BINGAMAN. Thank you very much.

Let me ask a few questions to you, Mr. Betti, and then you can defer to others if you would rather have them respond.

This working group that you have focused on this area, what timetable do you have? Correct me if I am wrong, but my understanding is that your position is that we should have some procurement integrity provisions on the books, but they should not be those that were suspended. It should be a modified version of those. And if that is true, when would we have your recommendations as to what the modified version should contain?

Mr. BETTI. Senator, that is correct. We feel that there is a better approach than the statute that is on the books, and there is an interagency group. It includes, not just DOD, but also other agencies of the executive branch so that we can cover all of the procurement, if you will, all of the acquisition process. From that standpoint, that does not put us in control of the timing, but we fully expect that somewhere between 60 to 90 days, we should have those recommendations to you.

Senator BINGAMAN. That causes us some difficulties because we are having another hearing of our subcommittee here on the 24th of April, at which time we had hoped to have all the legislative proposals from the administration in this area and in the procurement area generally. But I guess you are saying that that will not be possible.

Mr. BETTI. To the best of my knowledge, that is a tighter time frame than they have been working to, but let me take that message back and see if there is any opportunity to accelerate their deliberations.

Senator BINGAMAN. One of the problems we have had in this is that some of the criticism is that we need a simplified and changed law. I have heard that here today. That may be true.

Another of the suggestions is that what we really need are some decent regulations to implement the law, and that if we had regu-

lations that would clarify some of these points which really cannot be clarified in a general statute, a lot of problem would be solved.

Is there anything going forward with regard to proposing rules under this set of laws, or is that all in abeyance while you are considering a rewrite of the statute?

Mr. BETTI. Well, I think we are doing a little of both, Senator. Clearly, we would prefer to implement in regulation a different version of the law. However, there are parts of the law that we would expect, whether it ends up in law or not, probably should be clarified with regulations in any event.

We have a regulation on a unified policy that is for release of information that is now in draft form, and that was one of the items that was in that particular statute that we are talking about. So, we have picked up those things that we believe should go forward and are trying to implement those.

But in terms of simplification of the law, let me give you a couple of examples that were provided to me. One of them is that I understand we have four laws covering bribes and gratuities. We have five laws covering pre-employment limitation. We have 11 laws on the protection of proprietary and procurement sensitive information. So, that is the sort of simplification regime that I am talking about.

Senator BINGAMAN. So, you will expect to combine or eliminate duplication and get us your recommendation as to the one statute or, if necessary, more in each of those areas as I understand.

Mr. BETTI. I think the first effort will be to look at the law as it was written and to try to simplify and direct it and, in the process, simplify it as much as we can.

Senator BINGAMAN. Let me ask on this. You said that there is a draft rule on dissemination of information or distribution of information.

Mr. BETTI. Yes.

Senator BINGAMAN. When would we be able to see that? Is there any time frame that you could advise us of that relates to when that might be available?

Mr. BETTI. The draft is currently being reviewed by the people who can be impacted, and we would expect that review to be completed by the end of this month.

Senator BINGAMAN. The end of March.

Mr. BETTI. Yes.

Senator BINGAMAN. So, you are saying that sometime in early April we should be able to see that.

Mr. BETTI. Yes.

Senator BINGAMAN. Okay.

Mr. BETTI. That is assuming that the people who are reviewing it do not come up with significant changes, but that is our timetable.

Senator BINGAMAN. The Inspector General, who is going to testify here in a little while, indicates in her testimony that she views the writing of regulations as crucial. She says it would be very unfortunate if the procurement integrity provisions went back into effect in November of this year without clear regulations implementing the changes made by section 814.

You are in agreement with that, and I guess you are suggesting that whatever is recommended in the way of a new statute would also have with it the clarifying regulations that we would need?

Mr. BETTI. Well, again, we have a problem of timing here. The writing of the regulations I think is dependent on what you do with our suggestions. And frankly, having them all implemented by November strikes me as reasonably ambitious. I would hope that in your deliberations, when you have decided what the law will be, that you will allow us some time to get the regulations out before the law is actually effective.

Senator BINGAMAN. Let me ask just a couple of specifics, and then I will defer to Senator Wallop for his questions.

One of the things that this suspended law accomplished was to preclude a procurement official who was personally and substantially involved in a procurement action from working on that contract for a competing contractor for a period of 2 years.

Do you have a view that you could express today as whether that prohibition should remain in the law?

Mr. BETTI. Well, I do not have a view on the specifics, but I do have a view on the intent. I think we are all in agreement that we should not be in a position where a Government official, by switching sides, provides an unfair competitive advantage to his new employer. Another question is how do you resolve that issue so that it can be adequately articulated and still be fair?

Senator BINGAMAN. Let me defer to Senator Wallop for his questions.

Senator WALLOP. Mr. Chairman, thank you.

Operation Ill Wind, Mr. Betti, resulted in 34 convictions under laws that were in place before the enactment of the procurement integrity section of OFPP. My question is: had that legislation, the OFPP, been in effect to cover the actions under investigation, would it have made the investigation and prosecution of those criminal activities significantly easier?

Mr. BETTI. Well, my understanding is that it would not, but I would like to defer to Mr. Beach from the Navy who has spent considerably more time than I have looking at the individual infractions.

Mr. BEACH. Yes, sir. We had occasion to analyze that question both formally, in terms of the provisions of law, and also by discussing it with our Naval Investigative Service investigators, and the answer in a word is, no, it would not have been substantially easier. We have been able to reach all of the misconduct that has been identified in the cases thus far under existing law without missing anything that would have been covered by the procurement integrity provisions.

Senator WALLOP. Let me ask it the other way, and I want you to be honest now because what we are all trying to do is to get to the same point. I do not think anybody disagrees on the goals of integrity. Let me ask the question from the other direction.

Would it have been substantially harder or more complex?

Mr. BETTI. I am not going to answer your question directly, but maybe I can add a little. Then I will let Paul speak again.

Senator WALLOP. That's fine.

Mr. BETTI. I had a conversation with the U.S. attorney last week, Henry Hudson, and asked him specifically whether there was anything that he required in law that he did not have in prosecuting the specific indictments of the prosecution. His point to me was that the convictions were all distinct cases of bribery or fraud, and that the laws on the books were perfectly adequate to take care of all of these convictions.

Now, what I cannot answer is whether there are any——

Senator WALLOP. Well, that is a fair enough answer. And probably it would have been more appropriate to direct that to Mr. Hudson at some later time.

Mr. Betti, in your statement you assert that "section 27 contributes to a growing impression among the Government that as a class their integrity is in question and they are no longer trusted to exercise the responsibilities assigned to them."

Is it a question of possible modification, or is the approach in section 27 of trying to define coverage of situations, actions and individuals in a blanket fundamentally flawed? Just by way of asking you, is there a way to correct it, or is there a better approach that could be taken?

Mr. BETTI. I would like my colleagues to comment on that also, but my impression is that the way the statute is worded and the approach to it appears to start out with the underlying assumption that people are dishonest and therefore the statute is written in such a form to prevent that dishonesty from coming out. There are ways of writing the statute that I think are probably better worded and would have less of a morale impact. But you might like to hear the comments from the services.

Senator WALLOP. Mr. Welch?

Mr. WELCH. I would respond that the difficulty that we have had is convincing ourselves, as well as the many people involved, that the administrative process has a value added. It is very burdensome. First it was very burdensome to explain to the large number of people—and I think that has been illustrated—who may or may not have been included in the process.

I am not a lawyer, so I considered this very straightforwardly. Then when we asked our legal people to address the definitions that were in there, they addressed them very specifically but finished with,"We're not sure." That is very difficult then to add value to that process.

Now, on the positive side, we tried to take each of the items in there and go against the present regulation and law that we have as to how our training programs and how our communications programs and how our source selections and all these other items were run to see if, in fact, by improving those programs, would we not perhaps have more value added and be focused more on the point.

Senator WALLOP. I might say, Mr. Conver, I was disappointed in your summary statement because it basically said, as I understood it, that there weren't any problems with anything, and then you proceeded to recite a good many problems that went with it.

The fact of it is the number of regulations or the number of people that were covered under what might constitute a procurement official is directly attributable to the bad language of the provision. When people are trying to react to what has developed from

a political overreaction and was written with lousy language—and be honest about it. It really is. What the hell is a ""procurement action," for example? You are bound to get large numbers of regulations when people cover every conceivable malign thought that they believe that somebody else could conceive of.

Mr. CONVER. Senator, let me first apologize for what I think is an uncharacteristic lack of straightforwardness on my part. I do bring to this discussion a realization that we are treading on a fairly sensitive ground here, and we in no way want to convey to you and the Chairman or any others in the Congress that we do not share the intent that we all have in terms of trying to make sure we have the best process. But, indeed, if I have given the misimpression that we do not have some problems with the implementation of that, then I certainly did speak too ambiguously.

Let me just say that I have spoken to some of the people in the Army who have had to go out and actually conduct the training and get people to sign the certifications and what they have reported back to me, which is in a very general way, is that everybody wanted to know why we have to do this. And the folks who are administering the certificates really could not, with a straight face, reply that we are doing this to protect the integrity of the procurement process. They had to reply that they were doing this because it is the law. And I think there is a significant difference there.

Again, I do not want to tread on the sensitivities.

Senator WALLOP. Don't worry about it. [Laughter.]

The fact of it is that is how we got into the trouble.

My time is up, but let me just make an observation. I take it for granted that every one of you and the people principally under you share the goal of integrity in the procurement process. That is how you got through the hearing process in the first place. And so, therefore, that should not be in question, nor should it be in question of the people whom you hire. It should be a question of the people who transgress it, not the ones that are not transgressing it.

Mr. CONVER. Amen.

Senator BINGAMAN. Senator Wirth?

Senator WIRTH. Thank you very much, Mr. Chairman. I have a couple of questions.

As I understand your testimony, your thrust is that this is burdensome. I think most people agree that there are a number of burdens around. One of the arguments that you make is that there are overlaps in the procurement integrity law and other laws. That is your basic thrust. Is that correct?

Mr. BETTI. Yes, sir.

Senator WIRTH. And if we get rid of that duplication, that will ease the role that you have to play in enforcing the law and the role that contractors have to play in complying with the law. Is that correct?

Mr. BETTI. It would certainly be helpful.

Senator WIRTH. This exists particularly in discrimination on source selection information and in giving gratuities. Both of these are covered by other laws. Is that right?

Mr. BETTI. Yes.

Senator WIRTH. Are the remedies the same in other laws as they are in the procurement integrity reform laws? It is my understand-

ing that this legislation added a variety of remedies. It added civil penalties and administrative remedies that did not exist before. Is that correct?

Mr. BETTI. I am not sure I can answer the question that specifically. Maybe one of my colleagues can.

Senator WIRTH. But isn't that important? Isn't that a very important distinction? You say there is duplication in the law, but the remedies are different.

Mr. BETTI. That is not the point I was trying to make, Senator. You certainly could draw that conclusion from what I said, but that is not the point I was trying to make.

The point I was trying to make is that we have a number of laws out there. It would be very helpful if we had just one.

Senator WIRTH. And these are your recommendations as to how these laws can be formed into one comprehensive law?

Mr. BETTI. What I mentioned earlier is that we are trying to go through not only the law that was on the books and suspended but to also pick up the other laws and include those in our submission. That is our first attempt to react to that law and how it could be improved.

But before you came in, the Chairman indicated that the timetable we were on was probably not helpful. Therefore, I have volunteered to go back and see if I can expedite that, although it is an interagency effort and not just DOD. So, the point is I do not know how much we can do in total with what we provide you in the time that you require it.

Senator WIRTH. Do you support having a range of remedies, or do you think we should have the remedies that are described in title 18, which are criminal remedies.

Mr. BETTI. Are they all criminal?

Senator WIRTH. Should there be a range of remedies, and is that one of the things that the administration would like to see?

Mr. BETTI. I think the answer to that is yes, if by range of remedies what you mean is both civil and criminal remedies——

Senator WIRTH. That's right.

Mr. BETTI. Oh, I'm sorry. Yes. The range is appropriate.

Senator WIRTH. Let me see. You suspended this legislation last fall. Right?

Mr. BETTI. We suspended it? Congress suspended it.

Senator WIRTH. It was suspended in the fall.

Mr. BETTI. In December, was it?

Senator WIRTH. November.

Mr. BETTI. November?

Senator WIRTH. And leading up to the suspension of that legislation, was there discussion about this overlap and your concerns about the overlap? Bring me up to speed on that, will you, Mr. Betti?

Mr. BETTI. A lot of the discussion, at least the part that I participated in, had to do with the revolving door, as Senator Wallop said, the definition of when procurement begins; the definition of a procurement official; and how you identify and when you identify competing contractors, so there were a number of specific issues that were being discussed. But at that point in time it was also law.

Incidentally, when we are talking about reactions, there are overreactions. One of the contractors actually put out—you may have seen it—a version of the Miranda card as a result of the talk about procurement integrity talking to Government officials. The first question is: "Are you authorized by the agency head or contracting officer to talk to me about this project. If the answer is yes, ask question 2. If the answer is no, do not discuss the subject." And it goes on in that vein. Now, that can be defined as overreaction and maybe it was, but it is the type of thing that happens as a result of legislation that has some confusion associated with it.

Senator WIRTH. Suspension of this was put into the pay bill in the fall. Right?

Mr. BETTI. Yes.

Senator WIRTH. And we didn't have hearings on all that over here, did we?

Senator BINGAMAN. No.

Senator WIRTH. Where did that come from on the House side? It was put into the pay bill. Whose idea was it to put it in the pay bill?

Mr. BETTI. I can't answer that. I don't know.

Senator WIRTH. It was the administration's, wasn't it? Wasn't that a real coup for the administration to get that put in at the time? The purpose of my earlier question, Mr. Betti, was to say that the administration should have had some ideas as to what should replace the legislation. Suspension happened 5 or 6 months ago, and we are still without a framework to deal with what I think everybody is concerned about—procurement problems.

Now, it may well be that there is a lot of overlap in the existing law. But it seems to me that it is your responsibility—and I know that you have been through this with the Chairman—to set a more realistic timetable to solve the problem. The administration all got this put into the pay bill. It was an administrative initiative. I think you have a responsibility then to come back and replace this with something else, or be responsible enough to say to the American public that you don't care about procurement fraud.

Does that make sense? I only underline the Chairman's point of trying to urge you to get something up here on a realistic time schedule.

Mr. BETTI. I think your point in urging us is certainly a valid point.

I would go back to the discussion we were having earlier. It is my understanding that at least part of the pressure to legislate in the first place was a result of Ill Wind and the aftermaths of Ill Wind. Yet all of the prosecutions that have happened with Ill Wind were prosecutions that occurred with laws that were on the books. So, when we are talking about a timetable, it might be better to make sure that we are legislating the right things than it is to legislate them quickly.

There is no question that there is confusion out there, and we need to make sure that we do the best job we can collectively in protecting the taxpayers' dollars and at the same time getting the job done.

Senator WIRTH. Well, I would again emphasize what I know the Chairman has said about trying to determine what the administra-

tion wants to do on this front. There is a pattern that is beginning to emerge from at least my perspective. You look at what is going on in the administration—lots of talk—and it is hard to find the substance. President Bush says he is going to be the environmental President. It doesn't show up. He is going to be the education President. Where is it?

Now, he says we are going to reform the procurement process. But he slips opposing provisions into legislation on the House side—the pay bill—at a time when one of the real tigers over there on this subject, Jack Brooks, was even sick. You say, hey, we are all for procurement reform, but you have not sent anything up here that lays out how we are going to simplify the process.

I am sympathetic to the fact that this is a very complicated process. We just urge you. I think the administration, however, has a responsibility to come back if you do not like what has been done up here and got this particular change made—you have a responsibility to come back and tell us what you think ought to be done. I think the American public expects that from you. They certainly expect it from us.

I appreciate your being here.

Mr. Chairman, I am glad you had this hearing. I am critical of a lot of the overlap as it exists, but we have to be straightforward about how this happened and make sure that if you all want to kill our initiatives, you come back and tell us what you want to replace them with.

Senator BINGAMAN. Did you want a response? [Laughter.]

Senator WIRTH. Maybe that is an inaccurate description of what happened. Is that incorrect? It was the White House that got this provision put into the pay bill. Isn't that right?

Mr. BETTI. Frankly, I do not know what the mechanism was.

Senator WIRTH. That is what happened.

Mr. BETTI. I would only repeat in a different set of words that I think it is important that we understand the problem that we are trying to solve, as opposed to just legislating.

Senator WIRTH. You all must have understood it enough to want to change the law as it exists.

Mr. BETTI. We had problems with the law as it existed. I tried to recite some of them.

Senator WIRTH. But to lead up to the change in the law, you must have done an analysis which said these are the problems, and this is how we ought to change it.

We can keep going around this circle, Mr. Betti, but you all made those changes. Presumably behind those changes was a rationale for the changes that were made and were put in the pay bill.

Mr. BETTI. Senator, I would make one other comment. Then I think I have run out of steam on this particular subject.

The reason we were interested in having it suspended was the fact that what was there we felt was not workable. Now, you could argue that we should have had the modifications we needed to make it workable, and that is certainly a valid argument. But the first thing was not to have something there that wasn't workable.

Senator WIRTH. Then what is workable? It is very nice to come up here and say that something does not work and say that you

will give us an alternative option in a timely way. But, if it comes up here in June, you all are familiar enough with the legislative process to know that when we get to the end of the session, there simply won't be enough time. That is the way it works.

Now, it may be your intent to have it happen that way and thereby kill the current legislation, but I hope that is not the case.

Mr. BETTI. Well, the implication in that would be that we are not interested in making sure that we are running a clean and honest process, and that certainly is not the case. The case is whether we really need additional legislation in order to prevent the kind of——

Senator WIRTH. Well, then come out and tell us you do not need any more legislation. Then come out and say to us you do not need X, you do not need Y. You have enough remedies and you want to go ahead with that.

Mr. BETTI. That is exactly what is being reviewed. The question here is whether there are some modifications that would be helpful both in simplifying what is out there and the potential of adding. But I can only say again that the 34 convictions in Ill Wind required no change in laws.

Senator WIRTH. Thank you very much, Mr. Chairman.

Senator BINGAMAN. Thank you very much.

Let me ask on the certification issue. The provisions in the law, which I think several of you have criticized—and I have heard other people criticize them—the idea there was to require that contractors certified that they had not used illegally obtained information in the preparation of their bids and proposals, and that was the certification that we are talking about, as I understand it. And you can correct me if I am wrong here.

But the idea behind that was that we needed to get the attention of supervisors and top management to this problem. And we did not want them to be in a position to say I did not have any way of knowing whether that information that we used in our bid was illegally obtained, that it was not my doing. If you want to go after an underling, you can, but that certainly wasn't anything that we condoned around here. We were trying to impose upon these higher level corporate officials a responsibility to get into their own procedures and ensure that there was no activity going on which did involve illegally obtaining information. That is the idea behind it. And everybody says now it is unduly burdensome and not a good idea.

What do we do if we don't do certification? How do we accomplish that result of getting the contractor, the management personnel in key positions within these contracting firms to really give this attention. Would any of you like to comment on that?

Mr. BEACH. I would respond to it I think in two ways, Senator.

The first thing is for us I think to all recognize that now that we are 34 convictions downstream in Ill Wind, there is by that fact alone a tremendously greater focus on these kinds of issues within the contracting community, as well as within the government. And I think that is going to endure because, of course, the Ill Wind Investigation is not over yet, as best we know, and the fruits of that will likely be with us for a while.

Beyond that, I would note that as we have worked with contractors and in cases involving contractors during the process of Ill Wind, we have seen, in the Navy Department, what I would characterize as a good response from a number of corporations in terms of really focusing attention on revising, tightening up, establishing clear lines of accountability within their own organizations to ensure that they do not have the kind of problems that have exposed a number of corporations to not only criminal prosecution at the corporate level, but to prosecutions in Ill Wind at the individual level among company officials, and also problems with the Navy and the other services in terms of suspension and debarment and other administrative sanctions.

So, I would just observe in that regard that we have a panoply of remedies and means that we can use to focus the attention of corporate America. It is like anything else. You can always do more and you can always work harder at it, but I think we are making good progress in that regard.

I would like, if I may, to just make one mention about the certification requirements on the other side, inside the government, because that I think is a real problem. And it goes back to what I said about the psychological burden, as I would call it, on our own people.

Under the suspended provisions, our employees are required to make a certification with regard to individual procurements at the contracting officer level and our procurement officials, which may number many thousands of people, are also required to certify that they have been trained on and have read and are familiar with the contents of the requirements in the law and will not violate them.

There is a strong sense among our work force that they are being asked to certify that they are honest people. They are also concerned about being asked to certify that they understand and are familiar with the provisions of the laws, which in certain respects are somewhat uncertain and will, to some extent, always be subject to interpretation in any given case no matter how well we refine them.

So, I would urge that while we look at the burden on the contracting community that we not lose sight of what a certification mechanism of this sort says to the people who do the work for us in the public service.

Senator BINGAMAN. But am I right that your position is that we should eliminate the certification requirement as it applies to government employees and as it applies to people in the contracting community?

Mr. BEACH. That would certainly be my position, Senator. I am not sure whether I am speaking for anyone other than myself in that regard, and I would certainly defer to my senior colleagues. But based on our analysis, we just do not see what it adds because a certification requirement does not prevent anyone who consciously wants to break the law from doing so.

Mr. BETTI. I agree with that.

Senator BINGAMAN. And you do not think it helps focus their attention on the potential of accountability that they themselves have?

Mr. BETTI. Mr. Chairman, if I might, I think it is like a lot of other remedies. Taken in isolation, you could say, yes, that may add something. On the other hand, when we take all of the regulations and laws we have in the aggregate, it makes it very difficult to conduct business. So, yes, it may be a good idea in isolation, but I would submit that we really have to look at whether it has significant added value.

Senator BINGAMAN. Let me ask about remedies. Senator Wirth asked a question about that.

My understanding about the suspended law, the law that is now in suspension——

Senator WIRTH. Excuse me. While we are on the certification issue, could I just ask one follow-on on that?

Senator BINGAMAN. Yes, go ahead.

Senator WIRTH. One of the issues that you have been concerned about is the annual certification. Is that right? You have found that annual certification to be burdensome?

Mr. BEACH. I would say not so much burdensome administratively as psychologically.

Senator WIRTH. Is that required in the law that there be an annual certification?

Mr. BETTI. I don't think so, no.

Mr. BEACH. That is a regulatory requirement, Senator.

Senator WIRTH. So, you require that. You are coming here to tell us that the law is bad, but it is the requirement in the regulations that is most burdensome.

Mr. BEACH. Senator, if I may just turn to the law for a moment and speak to this issue, specifically. The certificate that is required by the law is the one that requires the contracting officer, prior to the award of the contract in each new contract or modification over $100,000, to certify that he is aware of no violations of the substantive requirements of the procurement integrity provisions.

Senator WIRTH. Is that an annual requirement?

Mr. BEACH. No, sir. That is a contract-by-contract requirement imposed on the contracting officer to do nothing more than certify that he is aware of no violations in a situation in which he otherwise has a general duty to prevent such violations and to bring them to the fore.

Senator WIRTH. Where does the annual part of that come in?

Mr. BEACH. There is a separate annual requirement imposed by regulation which pertains to training of employees in which employees certify that they are familiar with the provisions of the law.

Senator WIRTH. And should that be eliminated as well?

Mr. BEACH. I cannot characterize that as administratively burdensome. I would defer to the Department of Defense on that because I do not have any data to respond to you on that directly.

Mr. BETTI. I would think that we would not want to eliminate that because it fundamentally says it certifies that the training has been accomplished. That is different——

Senator WIRTH. So, the law says an individual has to be certified once, and the regulations say that that has to be done every year. Is that right?

Mr. BETTI. The law says with any contract. With any contract I believe there are three certifications. There are two from the contractors—four? Okay, I lost one someplace. Two from the contractors and one for the internal employees on that specific contract. And what is the fourth one?

Senator WIRTH. I think we are getting a little mixed up here. It is my understanding that there is only one requirement for training in the law, and that the regulations say that this has to be done every year. It sounds to me like you have added a good deal of complexity to this.

Mr. BETTI. My understanding is the complexity is really on the per contract basis. That is where the burden is and that is where the administrative burden is. And that is in the law. It is not in the regulations.

Senator WIRTH. Earlier we were talking about training. Maybe you could clarify this as to what you think is burdensome or not, and where that burden is related to the law versus what is in your own regulations.

Mr. BETTI. When you asked the question initially, I think it was being answered on the basis of what was in the law that had to do with the contracts. When the annual bit came up, we responded in terms of the regulation we have for training. I believe there is some overlap between the two because isn't there a training requirement also that is in the law, if you will?

Senator WIRTH. It sounds like there are too many requirements anyway.

Mr. BETTI. That's it.

Senator WIRTH. And we look forward to hearing from you on which part of the jungle ought to be sorted out.

Sorry, Mr. Chairman. I thank you.

Senator BINGAMAN. We are in the middle of a vote.

We have a lot of other questions, and we will give you copies of those. They may be useful to you in the preparation of your draft legislation or recommendations to us. I do think the point has been made loud and clear that we are anxious to try to work with you in improving this law because we recognize that there are problems in the implementation of it. I do think, though, that if we do nothing, it goes back into effect at the end of November. That is my understanding, and therefore it is in everybody's interest to do something and hopefully do the right thing. So, the gun is sort of at all of our heads.

Let me just urge that since we do have another hearing scheduled for April 24, if there is any way we can get our hands on proposals in this area in time to consider them at that hearing, it would certainly be helpful to us in trying to prepare proposed amendments to this law because I think we are trying to fix some of the problems and do it in a way that is responsible, and where there is duplication, to eliminate that.

On the remedy issue, my understanding is that the suspended law does put into place a remedy where you can do profit recapture, and that absent the suspended law that is not in statute, maybe it is by regulation or something—is there any capability to go after recapture of profits absent this kind of law?

Mr. BETTI. Yes.

Mr. BEACH. There is, yes, Senator. In the Ill Wind context with regard to those contractors who were initially searched or as to whom we had evidence that was otherwise of concern, we have a regulatory requirement in effect which enables us to utilize the profit recapture remedy. We have also been able to effectively—in the early Ill Wind cases that have been settled out as part of criminal plea bargains—utilize performance at no profit of tainted contracts as a preferable remedy for the government to actually voiding the contracts. So, we do have ways and means of achieving that at the current time. We do not have a generalized profit recapture remedy in and of itself that applies in all contracts.

Senator BINGAMAN. That could be written into all your contracts, but it has not been. Is that correct?

Mr. BETTI. I believe that's correct. It is not in all the contracts.

Mr. BEACH. It is generally something that we do as a lesser remedy under our generalized right to terminate tainted contracts for default.

Senator BINGAMAN. Well, I appreciate your testimony. I think these are complicated issues. I have no doubt that we are all trying to get something done. I think the problem is, of course, there are so many other items that we are also trying to make progress on, that something like this may well get pushed to the back and get short shrift. We are anxious that that not happen because this is the kind of area that I think people rightfully expect us to have a coherent set of statutory and regulatory remedies available and procedures available so that we can look out for the public and the taxpayer.

Let me conclude with that, and we will adjourn until after this vote. It will be about 10 minutes. And at that time, we will come back and hear from Susan Crawford, the Inspector General for the Department of Defense.

Thank you all very much.

[Recess.]

Senator BINGAMAN. The hearing will reconvene.

Ms. Crawford, it is a pleasure to welcome you.

Mrs. CRAWFORD. Thank you, Mr. Chairman.

Senator BINGAMAN. This is your first appearance before this subcommittee as the Department's Inspector General. We have benefited greatly in the past from the very thorough and objective work of your office, and look forward to working with you. So, thank you for being here, and please go right ahead with your testimony.

STATEMENT OF HON. SUSAN J. CRAWFORD, INSPECTOR GENERAL, U.S. DEPARTMENT OF DEFENSE, ACCOMPANIED BY STEPHEN A. TRODDEN, ASSISTANT INSPECTOR GENERAL FOR AUDITING, AND MORRIS B. SILVERSTEIN, ASSISTANT INSPECTOR GENERAL FOR CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT

Mrs. CRAWFORD. Thank you, Mr. Chairman and members of the subcommittee. I am pleased to appear before you today to discuss the lessons learned from Operation Ill Wind and other investigations over the past several years involving the Department of Defense acquisition process.

I am accompanied today by Mr. Stephen A. Trodden, Assistant Inspector General for Auditing, and Mr. Morris B. Silverstein, Assistant Inspector General for Criminal Investigations Policy and Oversight.

In the interest of time, Mr. Chairman, I will simply summarize my written statement, which I request be placed in the record.

Senator BINGAMAN. It will be included in the record.

Mrs. CRAWFORD. To set the stage for my subsequent remarks, I will briefly recap Operation Ill Wind. The name refers to a joint investigation conducted by the Naval Investigative Service, the Federal Bureau of Investigation and the Defense Criminal Investigative Service. Now in its fourth year, the investigation continues under the direction of the United States Attorney for the Eastern District of Virginia.

The investigation was initiated when a former Navy employee made allegations of bribery and corruption in the procurement process. Specifically, he alleged that former Department of Defense personnel, working either as employees or as consultants for defense contractors, offered payments to Department of Defense officials in exchange for inside information, including the amounts of competing bids, contract specifications and contract award criteria.

The investigation first drew public attention in June 1988 when four dozen defense contractors, consultants and Government officials had their homes and offices searched. To date, a total of 34 companies and individuals have been convicted. Over $26 million has been recovered through fines, payments of restitution and contract offsets.

As important and well publicized as the Ill Wind Investigation has been, it constitutes only a small part of the criminal investigative efforts focusing on Department of Defense programs over the past several years. In the past 2 years alone, the efforts of the Defense Criminal Investigative Service, an organization within the Office of the Inspector General which concentrates primarily on procurement fraud, have resulted in more than 600 indictments, 500 convictions, and $500 million in monetary recoveries. The military departments criminal investigative organizations have also been active in fighting defense procurement fraud.

The Department of Defense does not condone unethical or illegal behavior by its employees or by its contractors. Neither Operation Ill Wind nor the other extensive investigative work by the Office of the Inspector General and other law enforcement agencies indicates that the procurement process is rife with corruption. On the contrary, the investigative community is probably more aware than anyone else that only a small number of people in the system are susceptible to criminal temptations. We must be mindful that there are millions of honest, conscientious, taxpaying Government and contractor employees in the procurement process. We are proud of them and of the work that they do.

Operation Ill Wind revealed widespread trafficking of restricted information and several shocking instances of bribes and improper gratuities. It highlighted several internal management control areas that need strengthening to make the system less vulnerable to such abuses in the future. Its results do not, however, warrant perceptions that the source selection process is unfair, that the in-

tegrity of every official is suspect or that the Department of Defense is an easy mark for criminals.

With those caveats in mind, I will now discuss initiatives that have been or should be taken in response to the lessons learned from the investigative activities of the past several years.

We learned from Ill Wind that there were insufficient controls over acquisition-related information. Section 822 of the fiscal year 1990 Department of Defense Authorization Act directed the Department to describe a single, uniform regulation regarding the dissemination of and access to acquisition-related information. The Department is currently staffing a draft directive addressing this issue. I am hopeful that the directive will provide clear and uniform guidance.

In my opinion, the Department of Defense procurement community would benefit from policy guidance concerning withholding of progress and final payments in contracts tainted with fraud. Virtually no guidance exists now. In January of this year, I proposed an amendment to the Defense Federal Acquisition Regulation Supplement to provide additional guidance. It has not yet been acted upon. In one recent case, an Army procurement activity found itself dealing with a suspended contractor who had been indicted for defrauding the Government. The contracting officer had no legal basis to withhold a final payment of $300,000 from the contractor despite the fact that criminal and civil fraud proceedings were under way.

A high priority of the Office of the Inspector General has been to ensure that all available remedies, civil, criminal, contractual and administrative, are appropriately considered and used in each fraud case. Early on we recognized a number of areas where the Department clearly needed to improve its procedures to effectively resolve issues involving fraud.

There has been good progress. For example, as a result of our recommendations, the number of contractor suspensions and debarments has increased dramatically to more than 1,100 in fiscal year 1989.

Recent legislation and newly published regulations have expanded the coverage of suspension and debarment activities and closed loopholes.

During the past several years, Congress has enacted legislation to provide the Federal Government with the tools to detect and take action in cases of fraud, waste and abuse. We appreciate these initiatives and we urge the Congress to consider several additional tools to help in the fight against fraud, waste and abuse in the procurement process. These tools include additional arrest and search warrant authority, testimonial subpoena authority, modification of the grand jury secrecy laws, and increased access to contractor records by the Defense Contract Audit Agency.

The lack of authority to execute judicially approved search and arrest warrants often impedes our investigations. This office does not have the authority to make arrests, but does have the authority to seek and execute search warrants. In 1989, the Defense Criminal Investigative Service executed 62 search warrants. However, those warrants had to be executed in conjunction with other

Federal, State or local law enforcement agencies, a cumbersome procedure, because this office lacks full arrest authority.

In joint investigations involving other Federal law enforcement agencies with full law enforcement powers, primarily the FBI, the lack of arrest authority does not pose a serious problem. Those agencies can make arrests, if necessary. The Defense Criminal Investigative Service, however, has conducted several investigations on its own and has had to request the assistance of other agencies to conduct searches and execute search warrants. Waiting to obtain assistance from State, local or other Federal law enforcement agencies with full law enforcement powers delays the investigative process.

In criminal investigations where a search warrant has been obtained, the timing of the search can be critical to the successful seizure of the evidence covered by the warrant. Although many searches can be fully coordinated with other law enforcement agencies before evidence is lost or destroyed, some searches must be conducted within a very narrow window of opportunity. In those situations, other law enforcement agencies may not be available when needed.

Presently our subpoena authority extends only to documents. Collecting a mass of documents is not always sufficient without witness testimony to establish their relevance to the matter being investigated. As you are aware, the grand jury process may not be used to gather evidence and obtain testimony to pursue civil, administrative or contractual remedies. Testimonial subpoena authority would greatly facilitate our investigative efforts. The Congress has granted testimonial subpoena authority to compel testimony in administrative investigations in nearly 70 different statutes.

An additional tool, particularly needed in product substitution cases, is relaxation of the provisions of rule 6(e) of the Federal Rules of Criminal Procedure. That rule prohibits disclosure of testimony and other evidence developed in grand jury proceedings. Although information of a critical nature may exist, the Government prosecutor is barred from disclosing it to the Department of Defense officials responsible for mission readiness and safety.

We would also like to see rule 6(e) provisions relaxed to enable information regarding criminal fraud to be shared more easily by government attorneys seeking civil redress for fraudulent actions against the Department and by the cognizant contracting officials.

Our oversight review of the Defense Contract Audit Agency has shown that problems with access to records continue to persist with some contractors. While the Defense Contract Audit Agency has the power to issue subpoenas and has aggressively pursued the resolution of access issues, access problems continue. The existing legislation was enacted before the General Accounting Office had issued the Government auditing standards. Current law neither clearly defines what constitutes a contract audit nor makes reference to the Government auditing standards as a basis for determining what records are required for an audit.

Our last two semiannual reports to the Congress have indicated the need for legislation in that area. We have proposed legislation to the Department, but a decision has not been made whether it will be included in the DOD legislative package. Until legislation is

passed to provide the Defense Contract Audit Agency with the authority to obtain those records necessary to comply with prescribed auditing standards, the efficiency and effectiveness of our audit work will be impaired.

My written statement includes an assessment of the impact of the suspension of the procurement integrity provisions. Let me just say that I strongly support the objective of the procurement integrity provisions to curb abuses involving the disclosure of proprietary or source selection information that would give one contractor an unfair competitive advantage over another contractor. I also support the objective of the post- employment restrictions that are contained in section 27(e) of the procurement integrity provisions to limit a Government employee's ability to switch sides on a particular procurement to the detriment of the Government.

As you know, the procurement integrity provisions went into effect for approximately four months beginning in July, 1989. It is difficult in such a short period of time to assess either the effectiveness of the provisions or the impact of their suspension. There have been no criminal prosecutions under the procurement integrity provisions and very little empirical data exists.

No recent procurement-related legislation has created as much controversy as the procurement integrity provisions. I believe that much of the controversy resulted from uncertainty about the scope and reach of the provisions. Neither the procurement integrity provisions, nor the implementing regulations precisely define who is a procurement official or when the conduct of an agency procurement begins. The delay in issuing draft and interim regulations greatly contributed to the controversy and uncertainty.

Section 814 of the fiscal year 1990 Defense Authorization Act amended the statutory definition of procurement official and clarified when the conduct of a Federal agency procurement begins. The section also provided for recusal of procurement officials and written ethics advice. Whether the amendments will eliminate the uncertainty to which I have just referred, depends largely on the regulations implementing those changes. It would be very unfortunate if the procurement integrity provisions went into effect in November of this year without clear regulations implementing changes made by section 814.

One of the most difficult issues to resolve is balancing the exchange of people and ideas between Government and industry while maintaining integrity and public confidence in the Federal procurement process. Greater emphasis should be placed on a strong network of criminal statutes that severely punish both individuals and Government contractors who improperly acquire and misuse acquisition-related information. In the past, we have tended to focus our attention on post-employment restrictions as the method of restricting the flow of insider information. Our limited experience with the procurement integrity provisions suggests that imposing tough criminal, civil and contractual sanctions for the misuse of acquisition-related information, together with a contractor certification requirement, is a more direct and effective approach.

Section 27(i) of the procurement integrity provisions makes the trafficking in source selection or proprietary information a crimi-

nal offense. Requiring Government contractors to certify whether they have improperly used source selection information or proprietary information in preparing their bids or proposals is an effective enforcement mechanism. This certification requirement forced contractors to review and, in some cases, to change internal practices.

I am not certain that the training certifications and the contracting officer certifications have contributed to achieving the objectives of the procurement integrity provisions. All Department of Defense employees are already subject to departmental standards of conduct. These standards apply whether or not the employee has executed a certification. In addition, our contracting officers are duty bound to act in the best interest of the Government. The certification requirements imposed by the procurement integrity provisions on Government employees have created a substantial administrative burden and, inadvertently, may have signaled a distrust of our acquisition professionals.

With regard to the suspension of 10 United States Code, sections 2397a and 2397b and 18 United States Code, section 281, I am concerned that these provisions only apply to certain categories of Department of Defense military and civilian officials. I believe that ethics legislation should apply to all government officials with equal force. The patchwork quilt of ethics legislation applicable to the Department of Defense has laudable objectives, but in practice is very difficult to understand and explain to employees. I agree with the Under Secretary of Defense for Acquisition that a single, clear, comprehensive ethics bill would far better serve the public interest. It is important that there be a frank, open dialogue between the executive and legislative branches on ethics legislation so that the current confusion is eliminated.

I am pleased to report that the Defense Acquisition Regulatory Council has made considerable progress in responding to concerns raised in Inspector General reports. Many regulatory improvements have been made and several examples are enumerated in my written statement.

The results of Ill Wind and other investigations have focused additional attention on a longstanding management problem, poor control over consultants. The Department of Defense, like many other Federal agencies, does not know how much money is being spent for consultants hired by offices within the Department. It also has problems ensuring adequate competition for consulting contracts; avoiding open-ended, personal service type contracts; minimizing unnecessary expenditures for contracted advisory and assistance services; and measuring the cost-effectiveness of such services. The Department of Defense has recognized that many of its offices have grown too dependent on contracted advisory and assistance services and that the pervasive presence of non-government personnel exacerbates the problem of controlling sensitive acquisition-related information. The President's budget reflects a reduction of $1.1 billion over 5 years for contracted advisory and assistance services. I strongly support that initiative.

We perform annual audits of contracted advisory and assistance services, and are completing an extensive review that is part of a Government-wide audit. I consider this to be an area warranting continued, extensive coverage by the Office of the Inspector Gener-

al. Significant improvement in the area will be difficult, however, until arguments are resolved between the Office of Management and Budget, the major Federal agencies, and the Congress over how to define and report contracted advisory assistance services.

Insofar as consultants employed by Department of Defense contractors are concerned, the Ill Wind investigations triggered two very important, comprehensive Defense Contract Audit Agency reviews that led to the adoption of a significantly improved and tightened cost principle for Government contracts. The Congress also required the establishment of consultant registration procedures so that conflicts of interest can be identified. It is too soon to tell how much impact either of those measures has had, but I believe that they will be very helpful.

The Packard Commission and the Defense Management Report have focused on the need to foster an environment in which unethical behavior by either Government or contractor personnel is simply not tolerated. The Department of Defense established an Ethics Council that is chaired by the Under Secretary of Defense for Acquisition. Each of the Secretaries of the Military Departments are members, and the Department of Defense General Counsel and I serve as advisors. The Council is charged with developing ethics programs for the acquisition work force and also developing broader programs to enhance awareness and understanding of ethical issues department-wide.

The Inspector General, Department of Defense, has a long history of providing leadership and coordination in the development and implementation of policies that promote economies and efficiencies in defense operations, and assisting in prevention, as well as detection, of fraud, waste and abuse in those operations. I will continue that emphasis.

I am hopeful that the Department of Defense Ethics Council will provide strong leadership and that both Government and industry will sustain their commitments to meaningful ethics programs.

The results of Ill Wind and other investigations also illustrate the need for contractors to improve their internal controls, especially over consultants on their payrolls. As the July 1989 Defense Management Report to the President noted, contractor self-governance, along with vigorous law enforcement, "is the most promising additional mechanism to foster compliance with the high standards expected of DOD suppliers."

We have seen the most tangible demonstrations of self-governance from those contractors who have engaged in voluntary disclosure of potential criminal or civil fraud and those who are participating in the contractor risk assessment guide program.

The voluntary disclosure program was formally announced in a letter to industry in July 1986 from former Deputy Secretary of Defense Taft. Under that program, matters of potential criminal or civil fraud are brought to the Office of the Inspector General by the contractor. The commitment to the voluntary disclosure program by my office and Defense management remains strong. The recent Defense Management Report to the President continues to emphasize the need for voluntary disclosure.

As of March 13, 1990, 184 disclosures have been made, of which 175 resulted in admission into the program. To date, the program

has recovered $96.6 million, but I expect that total will begin to rise sharply as more of these cases are concluded.

Despite the merits of voluntary disclosure, there has been resistance to the program. That is best demonstrated by the fact that only 40 of the top 100 defense contractors have made disclosures. Apparently firms not accepting the concept of voluntary disclosure believe that the down-side risks of criminal prosecution, moneys determined to be owed to the Government, suspension and debarment, and the impact on employees' rights outweigh the benefits of the program. I do not agree.

The Department of Defense Contract Risk Assessment Guide program involves explicit coordination between the Government oversight team and the participating contractor so that the contractor fully understands what internal controls the Government expects. If the contractor demonstrates that effective controls are in place, direct Government oversight is reduced. Several large contractors have elected to participate in the program. The Department of Defense is working with those contractors to summarize and publicize the mutually beneficial effects of their participation so that the many companies who are sitting on the fence can better understand the advantages of participating.

Mr. Chairman, I have covered a lot of ground today and attempted to address the areas of concern mentioned in your invitation letter. I appreciate the opportunity to comment on these important matters. My staff and I stand ready to provide any additional information that might be helpful.

[The prepared statement of Mrs. Crawford follows:]

STATEMENT BY

MRS. SUSAN J. CRAWFORD

INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to discuss the lessons learned from Operation Ill Wind and other investigations over the past several years involving the Department of Defense acquisition process. I am accompanied by Mr. Stephen A. Trodden, Assistant Inspector General for Auditing, and Mr. Morris B. Silverstein, Assistant Inspector General for Criminal Investigations Policy and Oversight.

To set the stage for my subsequent remarks, I will briefly recap Operation Ill Wind. The name refers to a joint investigation conducted by the Naval Investigative Service, the Federal Bureau of Investigation, and the Defense Criminal Investigative Service. Now in its fourth year, the investigation continues under the direction of the United States Attorney for the Eastern District of Virginia. The investigation was initiated when a former Navy employee made allegations of bribery and corruption in the procurement process. Specifically, he alleged that former Department of Defense personnel, working either as employees or consultants for Defense contractors, offered payments to Department of Defense officials in exchange for inside information, including the amounts of competing bids, contract specifications, and contract award criteria.

The investigation first drew public attention in June 1988 when four dozen Defense contractors, consultants, and Government officials had their homes and offices searched. To date, a total of thirty-four companies and individuals have been convicted. Over $26,000,000 has been recovered through fines, payments of

restitution and contract offsets.

As important and well publicized as the Ill Wind investigation has been, it constitutes only a small part of the criminal investigative efforts focusing on Department of Defense programs over the past several years. In the past two years alone the efforts of the Defense Criminal Investigative Service, an organization within the Office of the Inspector General which concentrates primarily on procurement fraud, have resulted in more than 600 indictments, 500 convictions, and $500 million in monetary recoveries. The Military Department Criminal Investigative Organizations (the Army Criminal Investigation Command, the Naval Investigative Service Command, and the Air Force Office of Special Investigations) have also been active in fighting Defense procurement fraud.

The Department of Defense does not condone unethical or illegal behavior by its employees or by contractors. Neither Operation Ill Wind nor the other extensive investigative work by the Office of the Inspector General and other law enforcement agencies indicates that the procurement process is rife with corruption. On the contrary, the investigative community is probably more aware than anyone else that only a small number of people in the system are susceptible to criminal temptations. We must be mindful that there are millions of honest, conscientious, tax-paying Government and contractor employees in the procurement process. We are proud of them and the work that they do.

Operation Ill Wind revealed widespread trafficking in restricted information and several shocking instances of bribes and improper gratuities. It highlighted several internal management control areas that need strengthening to make the system less vulnerable to such abuses in the future. Its results do not, however, warrant perceptions that the source selection

process is unfair, that the integrity of every official is suspect, or that the Department of Defense is an easy mark for criminals.

IMPLEMENTING LESSONS LEARNED

With those caveats in mind, I will now discuss initiatives that have been or should be taken in response to the lessons learned from the investigative activities of the past several years.

Release of Acquisition-Related Information

We learned from Ill Wind that there were insufficient controls over acquisition-related information. Section 822 of the Fiscal Year 1990 Department of Defense Authorization Act directed the Department to prescribe a single, uniform regulation regarding the dissemination of, and access to, acquisition-related information. The Department is currently staffing a draft directive addressing this issue. I am hopeful that the directive will provide clear and uniform guidance.

Withholding Of Payments In Contracts Tainted by Fraud

In my opinion, the Department of Defense procurement community would benefit from policy guidance concerning withholding of progress and final payments in contracts tainted with fraud. Virtually no guidance exists now. In January of this year, I proposed an amendment to the Defense Federal Acquisition Regulation Supplement to provide additional guidance. It has not yet been acted upon. In one recent case, an Army procuring activity found itself dealing with a suspended contractor who had been indicted for defrauding the Government. The contracting officer had no legal basis to withhold a final

payment of $300,000 from the contractor despite the fact that criminal and civil fraud proceedings were under way.

Coordination of Remedies

One of the early lessons we learned from our investigative efforts was the need to ensure that information developed during the investigation was made available for noncriminal purposes. A high priority of the Office of Inspector General has been to ensure that all available remedies--civil, criminal, contractual, and administrative--are appropriately considered and used in each case. Early on, we recognized a number of areas where the Department clearly needed to improve its procedures to effectively resolve issues involving fraud.

Suspension and debarment--the procedures by which the Department of Defense can bar a contractor from doing business with the Government--was one of these areas. We found that more information was needed from criminal investigators to allow the suspension and debarring officials to determine whether to take actions against contractors determined not to be presently responsible. As a result of the implementation of our recommendations, the number of suspensions and debarments have increased dramatically to more than 1,100 in fiscal year 1989.

Recent legislation and newly published regulations have expanded the coverage of suspension and debarment activities. The Fiscal Year 1989 Department of Defense Authorization Act amended 10 U.S.C. § 2408(a) to provide a five-year debarment for persons convicted of defrauding the Defense Department.

New regulations have closed loopholes involving subcontractors. A 1989 change to the Defense Federal Acquisition Regulation Supplement:

- Extends the effect of immediate Government-wide debarment to contractors that are proposed for debarment;

- Requires prospective bidders to certify information regarding suspensions, debarments, indictments, and convictions against the company and its principals; and

- Requires a prime contractor, when seeking to use a debarred subcontractor, to make a compelling needs determination, and to notify the Government about that determination before entering into the subcontract.

As I previously mentioned, our investigative efforts suggested that the Department of Defense needed to better coordinate contractual, administrative, civil, and criminal remedies. Department of Defense Directive 7050.5, "Coordination of Remedies for Fraud and Corruption Related to Procurement Activities," was issued in June 1985, and reissued in June 1989, to provide for more effective and timely communication of investigative information. This has assisted the Department in applying appropriate remedies.

We are continuing to examine coordination of criminal, civil, contractual, and administrative remedies. I believe we can still make significant improvements in this area.

Congressional Action

During the past several years, Congress has enacted legislation to provide the Federal Government with the tools to detect and take action in cases of fraud, waste, and abuse. This legislation includes:

- The False Claims Act Amendments of 1986 (expanding the qui tam provisions and providing for treble damages);

- The Major Fraud Act of 1988 (creating a new criminal

offense, increasing penalties, and enhancing whistle-blower protection for contractor employees);

- Major Fraud Act Amendments of 1989 (providing for a reward of up to $250,000 to an individual providing information that leads to a conviction);
- The Anti-Kickback Act of 1986 (expanding anti-kickback coverage);
- The Anti-Drug Abuse Act of 1988 (providing an "obstruction of Federal audit" provision); and
- The Program Fraud Civil Remedies Act (allowing Federal agencies to impose administrative penalties for all false statements and false claims under $150,000).

We appreciate these initiatives, and we urge the Congress to consider several additional tools to help in the fight against fraud, waste, and abuse in the procurement process. These tools include: additional arrest and search warrant authority, testimonial subpoena authority, modification of the Grand Jury secrecy laws, and increased access to contractor records by the Defense Contract Audit Agency auditors.

Arrest and Search Warrant Authority

The lack of authority to execute judicially approved search and arrest warrants often impedes our investigations. This office does not have the authority to make arrests, but does have the authority to seek and execute search warrants. In 1989, the Defense Criminal Investigative Service executed sixty-two search warrants. However, those warrants were executed in conjunction with other Federal, state or local law enforcement agencies--a cumbersome procedure--because this office lacks full arrest authority.

In joint investigations involving other Federal law

enforcement agencies with full law enforcement powers (primarily the Federal Bureau of Investigation), the lack of arrest authority does not pose a serious problem. Those agencies can make arrests if necessary. The Defense Criminal Investigative Service, however, has conducted several investigations on its own and has had to request the assistance of other agencies to conduct searches and execute arrest warrants. Waiting to obtain assistance from state, local, or other Federal law enforcement agencies with full law enforcement powers delays the investigative process.

In criminal investigations where a search warrant has been obtained, the timing of the search can be critical to the successful seizure of the evidence covered by the warrant. Although many searches can be fully coordinated with other law enforcement agencies before evidence is lost or destroyed, some searches must be conducted within a very narrow window of opportunity. In those situations, other law enforcement agencies may not be available when needed.

Testimonial Subpoena Authority

Testimonial subpoena authority is also a matter of concern to this office. The Congress has provided Federal agencies with a number of remedies to redress instances of fraud in the procurement process. Yet, those remedies are effective only if sufficient information is gathered to warrant and support their use.

Presently, our subpoena authority extends only to documents. Collecting a mass of documents is not always sufficient without witness testimony to establish their relevance to the matter being investigated. As you are aware, the Grand Jury process may not be used to gather evidence and obtain testimony to pursue

civil, administrative, or contractual remedies. Testimonial subpoena authority would greatly facilitate our investigative efforts. The Congress has granted testimonial subpoena authority to compel testimony in administrative investigations in nearly seventy different statutes.

Use of Grand Jury Testimony

An additional tool, particularly needed in product substitution cases that involve a risk of serious injury or impairment of Defense mission readiness, is relaxation of the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure. That rule prohibits disclosure of testimony and other evidence developed in Grand Jury proceedings. Although information of a critical nature may exist, the Government prosecutor is barred from disclosing it to the Department of Defense officials responsible for mission readiness and safety. We would also like to see Rule 6(e) provisions relaxed to enable information regarding criminal fraud to be shared more easily by Government attorneys seeking civil redress for fraudulent actions against the Department and by the cognizant contracting officer.

Access to Records by the Defense Contract Audit Agency

Our oversight review of the Defense Contract Audit Agency has shown that problems with access to records continue to persist with some contractors. While the Defense Contract Audit Agency has the power to issue subpoenas and has aggressively pursued the resolution of access issues, access problems continue. The existing legislation has several shortcomings. The two contract clauses covering access by the Defense Contract Audit Agency to contractors' records are based upon legislation, i.e., 10 U.S.C. §§ 2306a and 2313a. The former was enacted in

1948 and the latter in 1968. Both of these sections were enacted before the General Accounting Office had issued the Government Auditing Standards. Current law neither clearly defines what constitutes a contract audit nor makes reference to the Government Auditing Standards as a basis for determining what records are required for an audit.

The Newport News Shipbuilding and Dry Dock Company challenged Defense Contract Audit Agency subpoenas for records. The district and appeals courts ruled that the company did not have to provide its internal audit reports to the Defense Contract Audit Agency. The rulings were based on the courts' interpretation of existing statutes and not whether the records were required by the Defense Contract Audit Agency to comply with Government Auditing Standards.

One of the American Institute of Certified Public Accountants Standards, incorporated into the Government Auditing Standards, requires that auditors review the adequacy of contractor internal controls before determining the scope of their audit tests. In general, the more effective the internal controls, the less testing is required. Accordingly, the auditing standards provide that the external auditor should review internal audit reports and working papers as part of the evaluation of internal controls. Therefore, access to internal audit reports should enable the Defense Contract Audit Agency to reduce coverage where justified and in so doing eliminate excessive and duplicative coverage of contractors' records.

Our last two Semiannual Reports to the Congress have indicated the need for legislation in that area. We have proposed legislation to the Department, but a decision has not been made whether it will be included in their legislative package. Until legislation is passed to provide the Defense

Contract Audit Agency with the authority to obtain those records necessary to comply with prescribed auditing standards, the efficiency and effectiveness of our audit work will be impaired.

Suspension of Section 27 of the Office of Federal Procurement Policy Act, 10 U.S.C. §§ 2397a and 2397b, and 18 U.S.C. § 281

You have asked for my assessment of the impact of the suspension of several statutes: the Procurement Integrity Provisions contained in Section 27 of the Office of Federal Procurement Policy Act and the post-employment restrictions contained in 10 U.S.C. §§ 2397a and 2397b and 18 U.S.C. § 281. Let me begin by discussing the Procurement Integrity Provisions.

Mr. Chairman, I strongly support the objective of the Procurement Integrity Provisions--to curb abuses involving the disclosure of proprietary or source selection information that would give one contractor an unfair competitive advantage over another contractor. I also support the objective of the post-employment restrictions that are contained in section 27(e) of the Procurement Integrity Provisions--to limit a Government employee's ability to "switch sides" on a particular procurement to the detriment of the Government.

As you know, the Procurement Integrity Provisions went into effect for approximately four months beginning in July 1989. It is difficult, in such a short period of time, to assess either the effectiveness of the provisions or the impact of their suspension. There have been no criminal prosecutions under the Procurement Integrity Provisions and very little empirical data exist. For that reason, I can only share my impressions and observations with the Committee.

No recent procurement-related legislation has created as much controversy as the Procurement Integrity Provisions. I

believe that much of the controversy resulted from uncertainty about the scope and reach of the provisions. Neither the Procurement Integrity Provisions nor the implementing regulations precisely defined who is a procurement official or when the conduct of an agency procurement begins. The delay in issuing draft and interim regulations greatly contributed to the controversy and uncertainty.

Section 814 of the Fiscal Year 1990 Defense Authorization Act amended the statutory definition of procurement official and clarified when the conduct of a Federal agency procurement begins. The section also provided for recusal of procurement officials and written ethics advice. Whether the amendments will eliminate the uncertainty to which I have just referred depends largely on the regulations implementing those changes. It would be very unfortunate if the Procurement Integrity Provisions went back into effect in November of this year without clear regulations implementing changes made by section 814.

The Procurement Integrity Provisions have had a number of positive effects:

- The training mandated by the provisions has fostered a greater awareness of the necessity to disseminate i formation equally to all;
- Procuring activities have made greater use of industry briefings and pre-proposal conferences; and
- Individuals have been discouraged from making ad hoc releases of acquisition-related information.

The Procurement Integrity Provisions have also had several negative consequences:

- The provisions have had an apparent chilling effect on dialogue between industry and the Defense Department. Conservatism on both sides and uncertainty about the scope of the

provisions has eliminated interchange that was never intended to be prohibited; and

- The certification requirements by procurement officials and contracting officers have imposed a substantial administrative burden.

One of the most difficult issues to resolve is balancing the exchange of people and ideas between Government and industry while maintaining integrity and public confidence in the Federal procurement process. Greater emphasis should be placed on a strong network of criminal statutes that severely punish both individuals and Government contractors who improperly acquire and misuse acquisition-related information. In the past, we have tended to focus our attention on post-employment restrictions as the method of restricting the flow of insider information. Our limited experience with the Procurement Integrity Provisions suggests that imposing tough criminal, civil, and contractual sanctions for the misuse of acquisition-related information together with a contractor certification requirement is a more direct and effective approach.

Section 27(i)[1] of the Procurement Integrity Provisions makes the trafficking in source selection or proprietary information a criminal offense. That is one of the most important sections of the Procurement Integrity Provisions. Requiring Government contractors to certify whether they have improperly used source selection information or a competitor's proprietary information in preparing their bids or proposals is an effective enforcement mechanism. This certification requirement forced contractors to review and, in some cases, to change internal practices.

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[1] This section was originally codified at 41 U.S.C. § 423(i). Section 814(a) Fiscal Year 1990 Defense Authorization Act, Pub. L. No. 101-189, redesignated this section 41 U.S.C. § 423(j).

I am not certain that the training certifications and the contracting officer certifications have contributed to achieving the objectives of the Procurement Integrity Provisions. All Department of Defense employees are already subject to departmental Standards of Conduct. These standards apply regardless of whether the employee has executed a certification. In addition, our contracting officers are duty bound to act in the best interests of the Government. The certification requirements imposed by the Procurement Integrity Provisions on Government employees have created a substantial administrative burden and, inadvertantly, may have signaled a distrust of our acquisition professionals.

With regard to the suspension of 10 U.S.C. §§ 2397a and 2397b and 18 U.S.C. § 281, I am concerned that the provisions only apply to certain categories of Department of Defense military and civilian officials. I believe that ethics legislation should apply to all Government officials with equal force. The patchwork quilt of ethics legislation applicable to the Department of Defense has laudable objectives, but in practice is very difficult to understand and explain to departmental employees. I agree with the Under Secretary of Defense for Acquisition that a single, clear, comprehensive ethics bill would far better serve the public interest.

It is important that there be a frank, open dialogue between the Executive and Legislative Branches on ethics legislation so that the current confusion is eliminated.

Other Regulatory Improvements

I am pleased to report that the Defense Acquisition Regulatory Council has made considerable progress in responding to concerns raised in Inspector General reports. Many regulatory

improvements have been made. For example:

- The Department initiated a change to the Defense Federal Acquisition Regulation Supplement that will permit contracting officers to obtain information from claimants concerning other claims they had filed. The change will help to protect the Government against so-called "claims experts" who file multiple claims.

- A Federal Acquisition Regulation provision implemented procedures to evaluate whether to retain or dispose of Government owned special tooling and test equipment after the contract is completed.

- A Federal Acquisition Regulation provision provided better guidance concerning the suspension or reduction of progress payments when a contractor fails to correct accounting system deficiencies.

- A Federal Acquisition Regulation provision has been approved that will limit the amount of amortization, cost of money, and depreciation allowable when a change in ownership occurs.

Consultants

The results of Ill Wind and other investigations have focused additional attention on a long-standing management problem--poor control over consultants. The Department of Defense, like many other Federal agencies, does not know how much money is being spent for consultants hired by offices within the Department. It also has problems ensuring adequate competition for consulting contracts; avoiding open-ended, personal service type contracts; minimizing unnecessary expenditures for contracted advisory and assistance services; and measuring the cost effectiveness of such services. The Department of Defense has recognized that many of its offices have grown too dependent

on contracted advisory and assistance services and that the pervasive presence of non-government personnel exacerbates the problem of controlling sensitive acquisition-related information. The President's budget reflects a reduction of $1.1 billion over five years for contracted advisory and assistance services. I strongly support that initiative.

We perform annual audits of contracted advisory and assistance services, and are completing an extensive review that is part of a Government-wide audit. I consider this to be an area warranting continued, extensive coverage by the Office of the Inspector General. Significant improvement in the area will be difficult, however, until arguments between the Office of Management and Budget, the major Federal agencies, and the Congress over how to define and report contracted advisory and assistance services are resolved.

Insofar as consultants employed by Department of Defense contractors are concerned, the Ill Wind investigations triggered two very important, comprehensive Defense Contract Audit Agency reviews that led to the adoption of a significantly improved and tightened cost principle for Government contracts. The Congress also required the establishment of consultant registration procedures so that conflicts of interest can be identified. It is too soon to tell how much impact either of those measures has had, but I believe that they will be very helpful.

Initiatives to Promote Ethical Conduct

The Packard Commission and the Defense Management Report have focused on the need to foster an environment in which unethical behavior by either Government or contractor personnel is simply not tolerated. The Department of Defense established an Ethics Council that is chaired by the Under Secretary of

Defense for Acquisition. Each of the Secretaries of the Military Departments are members and the Department of Defense General Counsel and I serve as advisors. The Council is charged with developing ethics programs for the acquisition work force and also developing broader programs to enhance awareness and understanding of ethical issues Department-wide. The goal of the program is to promote an ongoing dialogue on ethics issues within the Department--from the Secretary and Deputy Secretary to the most basic working level.

The Inspector General, Department of Defense, has a long history of providing leadership and coordination in the development and implementation of policies that promote economies and efficiencies in Defense operations, and assist in prevention, as well as detection of, fraud, waste, and abuse in those operations. In 1982, this office began publishing prevention oriented pamphlets such as "Fraud Awareness Letters" and "Indicators of Fraud in DoD Procurement." Many of our publications, then and now, are directed to acquisition operations.

We have also published guides to help employees understand the Standards of Conduct and keep out of trouble. Our most popular publication, "Defense Ethics: A Standards of Conduct Guide for DoD Employees," January 1989, has been distributed to over 50,000 employees. Last year, we started the production of a video on ethics and professionalism that will be released by the Department of Defense Ethics Council later this year. Actual cases, sanitized and modified, are used to disseminate "lessons learned" to our mid-level managers.

At our suggestion, incoming personnel in the Office of the Secretary of Defense receive ethics briefings. We routinely provide informational materials and speakers for ethics training

classes at Department of Defense schools and colleges. We also work with professional organizations to ensure their conferences include programs on ethical conduct in the business environment.

I am hopeful that the Department of Defense Ethics Council will provide strong leadership and that both Government and industry will sustain their commitments to meaningful ethics programs.

Contractor Self-Governance

The results of Ill Wind and other investigations also illustrate the need for contractors to improve their internal controls, especially over consultants on their payrolls. As the July 1989 Defense Management Report to the President noted, contractor self-governance, along with vigorous law enforcement, "is the most promising additional mechanism to foster compliance with the high standards expected of DoD suppliers."

Self-governance includes a contractor's programs and activities whose purpose is to achieve the highest possible standards for ethical business conduct. There have been different means used in self-governance programs, to enhance compliance with legal, regulatory, and contractual requirements. Those include adopting strong codes of ethics, training, effective disciplinary systems for violation of the codes of ethics, hotlines, ombudsmen, internal controls, and external reviews.

Self-governance programs do not replace Government oversight. As the Packard Commission noted, no "conceivable number of additional Federal auditors, inspectors and prosecutors can police [the acquisition process] fully, much less make it work effectively. Nor have criminal sanctions historically proved to be a reliable tool for assuring contractor compliance."

While formal programs such as the Defense Industry Initiatives provide a framework for self-governance, they are not necessarily indicative of their effectiveness. The success or failure of a self-governance program will depend not only on the announcement of a program but, more importantly, on the commitment of corporate management and the active implementation of the program at the operating level. Increased or decreased incidents of fraud cases are not necessarily the best measure of effectiveness. While a reduction in violations might be an indicator of increased self-governance, it also might be the result of reduced or less effective oversight.

We have seen external demonstrations of self-governance among those contractors who have engaged in voluntary disclosure of potential criminal or civil fraud and those who are participating in the Contractor Risk Assessment Guide Program. It is to early to determine whether those and other contractor self-governance efforts will achieve their objectives of the highest possible standards for ethical business conduct.

Effectiveness of Voluntary Disclosure Initiatives

The Voluntary Disclosure Program was formally announced in a letter to industry in July 1986 from former Deputy Secretary of Defense Taft. Under that program, matters of potential criminal or civil fraud are brought to the Office of the Inspector General by the contractor. The commitment to the Voluntary Disclosure Program by my office and Defense management remains strong. The recent Defense Management Report to the President continues to emphasize the need for voluntary disclosure.

As of March 13, 1990, 184 disclosures have been made, of which 175 resulted in admission into the program. The nine rejected disclosures involved matters already under investigation

by the Government. Forty of the top 100 Defense contractors have made 130 of the 184 disclosures. To date, the program has recovered $96.6 million, but I expect that total will begin to rise sharply as more of these cases are concluded. One contractor has been convicted twice involving voluntary disclosures that were made before the program was formalized. There have been twenty convictions of individuals involving voluntary disclosures, with five indictments currently pending. I hasten to point out that not a single corporation has been suspended or debarred as a result of a voluntary disclosure.

There are advantages to the contractor to participating in the Voluntary Disclosure Program.

- The continuing nature of many types of procurement fraud requires disclosure to prevent continuing and increased criminal exposure.
- Disclosure assists in preventing suspension and debarment until after the Department of Defense verification of the contractor's disclosure. At the same time, the contractor can demonstrate present responsibility by disclosing and taking corrective actions.
- Disclosure becomes a favorable factor, along with cooperation, in the Department of Justice determination whether to prosecute, although it is clear that the Voluntary Disclosure Program is not an amnesty program.
- Disclosure reduces potential civil fraud liability under the Civil False Claims Act.
- Disclosure eliminates much of the disruption and uncertainly surrounding Government investigations.

Despite the merits of voluntary disclosure, there has been resistance to the program. That is best demonstrated by the fact that only 40 of the top 100 Defense contractors have made disclosures. Apparently, firms not accepting the concept of

voluntary disclosure believe that the downside risks of criminal prosecution, monies determined to be owed to the Government, suspension and debarment, and the impact on employees' rights outweigh the benefits of the program.

Contract Risk Assessment Guide Program

The Department of Defense Contract Risk Assessment Guide Program was established in November 1988 by the Department of Defense to improve its oversight of Defense contractors and to promote industry self-governance through stronger contractor internal controls. Essentially, the program involves explicit coordination between the Government oversight team and the participating contractor so that the contractor fully understands what internal controls the Government expects. If the contractor demonstrates that effective controls are in place, direct Government oversight is reduced. The following contractors have elected to participate in the program: McDonnell Douglas, General Dynamics, General Electric, Unisys, Raytheon, Martin Marietta, and Rockwell. The Department of Defense is working with those contractors to summarize and publicize the mutually beneficial effects of their participation so that the many companies who are "sitting on the fence" can better understand the advantages of participating.

SUMMARY

Mr. Chairman, I have covered a lot of ground today and attempted to address the areas of concern mentioned in your invitation letter. I appreciate the opportunity to comment on these important matters. My staff and I stand ready to provide any additional information that might be helpful.

Senator BINGAMAN. Thank you very much.

Senator WALLOP. Can I just ask Mrs. Crawford one thing because I find a really troubling statement in here? Toward the end of your statement, you say: "Despite the merits of voluntary disclosure, there has been resistance to the program. That is best demonstrated by the fact that only 40 of the top 100 defense contractors have made disclosures."

Are you assuming that the other 60 have something to disclose and are therefore dishonest?

Mrs. CRAWFORD. Many of those who are not included in that 40 are under criminal investigation right now for other matters. It would seem to me, if a contractor had known about those matters and had brought them to our attention, they would have been good candidates to be in the voluntary disclosure program.

Senator WALLOP. But that is not my question. You say many of those that are in the 60, but are you saying that all of those——

Mrs. CRAWFORD. No, I do not mean to imply that all of the 60 have something to disclose.

Senator WALLOP. Well, that is the nature of the sentence, and I would hope that for the record you would not assume that everybody was guilty merely because they have not disclosed.

Mrs. CRAWFORD. I apologize for my inartful drafting.

Senator BINGAMAN. Let me ask about the Ill Wind Investigation. You have stated that there is about $26 million that has been recovered through fines, payments of restitution and contract offsets as a result of the investigation so far.

Do we have any estimate as to the amount of money that was lost by the Government as a result of these activities that are the subject of the prosecutions? How much of the money was lost? I guess the $26 million is obviously less than that.

Mrs. CRAWFORD. Mr. Chairman, that is a very difficult question to answer. Obviously, we know $26 million has been recovered to date. We also know that investigations continue and that the $26 million will be added to.

However, it is very difficult to judge what is the value of the loss of a competitive advantage. I am not sure we would ever be able to put a dollar value to the encumbrance placed upon the competitive process by the trafficking of source selection information that occurred. I am not certain that we will ever come up with a finite figure that would answer your question.

Senator BINGAMAN. On the release of acquisition information, DOD has, according to Mr. Betti, a rule which is about to be done in final form and will be released.

What involvement, if any, do you have or has your office had in review of that rule? Are they going to be proposing something to us which then you take exception to?

Mrs. CRAWFORD. They are staffing that particular directive with my office right now. We have had input into the directive and are reviewing it in the staffing process.

Senator BINGAMAN. So, whatever they submit to us in that connection or whatever they decide to implement in that connection should be something you are in agreement with.

Mrs. CRAWFORD. It should be, yes, but the Department does not have to accept my office's opinion.

Senator BINGAMAN. All right.

You have asked that we amend the law to give your office some new statutory authority in four areas. Let me just take one of those, the authority to execute arrest and search warrants. Is that something that other IGs have throughout the Federal Government?

Mrs. CRAWFORD. No, it is not something they generally have. Most of the statutory inspectors general do not have that authority at this time.

Senator BINGAMAN. And what were the reasons that you felt it would be appropriate in your Department where it is not in any of the others?

Mrs. CRAWFORD. I am speaking just for my Department. I would presume that there would be other Inspectors General who may want to argue the same for their own departments, but let me just speak for the Department of Defense.

There are occasions when the Defense Criminal Investigative Service is conducting an investigation and has reason to execute a search warrant but in the execution of that warrant cannot arrest an individual should that need arise. In order to have someone with arrest authority present, they would need to contact the Federal Bureau of Investigation, the U.S. Marshals Service or state or local law enforcement officials to assist them because we do not have arrest authority.

I would say to you that in most cases, most of our search warrants are executed in conjunction with the FBI, and this is not a problem. However, there is a small category of cases in which we would be acting alone, and there is the possibility that we would miss the opportunity to make an arrest. Arrest authority is part of what we call full law enforcement authority. Our criminal investigators have a number of authorities, but they do not have the complete set of tools that a law enforcement official should have in order to effectively carry out his or her function as a law enforcement official.

Senator BINGAMAN. One of the other suggestions you made, or request rather, would be that you be given authority to compel testimony as part of an investigation. Again, is that something that other Inspectors General have?

Mrs. CRAWFORD. No other Inspectors General have that authority. However, that authority does exist elsewhere in the Government.

I feel particularly strongly about testimonial subpoena authority. We do, as you know, have the authority to subpoena documents, and we do vigorously subpoena documents when we are involved in a criminal investigation. Frequently we will get those documents and we will need someone to explain to us how those documents fit together in the pattern of how the contractor works. Usually that is an employee of the defense contractor. That employee is not going to come forward voluntarily for fear of reprisal from the contractor. If we had the authority to subpoena that particular individual or individuals, they could help explain how the documents fit into the pattern of business that was being conducted by the contractor.

As you know, the grand jury cannot be used to assist in a civil fraud matter or in an administrative or contractual coordination of remedies issue. The subpoena authority of witnesses would enable us to bring people out of the grand jury realm, to be able to answer questions, and enable us to prosecute using civil procedures. When we refer to civil fraud recoveries, we are referring to the possibility of recovering three times the damage to the Government. In terms of monetary recoveries to the Government, quite often civil recoveries are far greater in dollar amounts than are the criminal recoveries.

Senator BINGAMAN. Do you now have to go to the Justice Department to get subpoenas issued to pursue civil remedies?

Mrs. CRAWFORD. We do, in order to compel witness testimony. But, of course, the grand jury cannot be used to compel witness testimony for purely civil matters. The Justice Department would not be able to use the grand jury procedures unless there was a concurrent criminal and civil case.

Senator BINGAMAN. The Justice Department, of course, could initiate a civil case and then proceed to get subpoenas issued to pursue that investigation.

Mrs. CRAWFORD. No. To come before the grand jury, there must be a criminal case.

Senator BINGAMAN. No, I agree, not before a grand jury, but just get the judge to issue subpoenas——

Mrs. CRAWFORD. Yes.

Senator BINGAMAN. ——and compel testimony that way. But that is too burdensome.

Mrs. CRAWFORD. Mr. Silverstein is with my office now, but was formerly with the Justice Department. He has a great deal of experience in this area.

Mr. SILVERSTEIN. The Civil Division at the Department of Justice cannot utilize the grand jury.

Senator BINGAMAN. Right.

Mr. SILVERSTEIN. Once a suit has been filed, there is an exception for which they can obtain grand jury information, preliminary to or in connection with the judicial proceeding, but that usually occurs after most of the investigation has been done. Often they are not able to get that, so they have to go back and basically redo the entire investigation that was done in the criminal context.

Senator BINGAMAN. But let me just clarify. Now, as I understand it, you are not suggesting that you should be able to access grand jury investigations for purposes of pursuing criminal or civil remedies. You are suggesting that you be given the power to compel testimony as part of a civil investigation. Is that right? You still have to duplicate. You still have to go over the same ground that the grand jury went over, but on the civil side.

Mr. SILVERSTEIN. The testimonial subpoena authority would be used as the IG subpoena for documents presently is being used, to obtain information for administrative, contractual and criminal purposes. It would be used to obtain the background information, how the company operates, what the documents mean. In complex accounting fraud investigations, in certain instances it has taken a year and a half for the Government to understand the document

flow because contractor employees would not talk to the Government.

Mrs. CRAWFORD. If I could expand on that for just a moment.

Senator BINGAMAN. Sure.

Mrs. CRAWFORD. The problem with using the grand jury procedure is that information obtained by the grand jury is subject to the secrecy rules and the prosecutor is barred from sharing that information with the Department of Defense. We may have an active criminal investigation ongoing, being jointly prosecuted or investigated by the FBI and the Department of Defense. Information may be revealed through the grand jury procedure that is unavailable to Department management officials who might want to take systemic or management actions. Department officials may want to take administrative actions or contractual actions on the contract, yet that information is not available to them.

For that reason, we tend to use our subpoena authority that presently exists for documents outside of the grand jury procedure in conjunction with the Department of Justice. Of course, we coordinate that with them. Information obtained through the IG subpoena authority is then available for other uses within the Department. If we could add the ability to compel witnesses to testify to assist us, the same as documents would assist us, then that would greatly expand our abilities to deal with the administrative and contractual problems that exist.

Senator BINGAMAN. My time is up. Senator Wallop?

Senator WALLOP. I have to say, Mrs. Crawford, I find your testimony really troubling.

What constraints on your behavior would there be if you got all these new powers that you seek? I am not trying to find a way for criminals to get off, but how many procedures would one contractor be under at the same time if you had all these powers, civil, criminal, grand jury, both civil and criminal for you?

Mrs. CRAWFORD. We have procedures in place right now that govern IG subpoena authority for documents. The same procedures, the same levels of review, relevance to the particular investigation, coordination with the Department of Justice, a legal review by the Department, all of these safeguards are in place now. I am the only person authorized to issue IG subpoenas and they go through a rigorous review within my office and the Office of the General Counsel.

Senator WALLOP. Yes, but you are seeking more authority.

Mrs. CRAWFORD. I am seeking additional authority.

Senator WALLOP. Plus earlier in your testimony, you stated that you need new investigative manpower, sort of police power of arrest. These are things that are pretty unusual for Inspectors General, are they not?

Mrs. CRAWFORD. Senator, allow me to tell you a little bit about the Defense Criminal Investigative Service, an organization of approximately 350 criminal investigators that are a part of my office. This organization was started in 1981 by Secretary Weinberger, and became a part of the DOD IG's Office in 1982 when the office was created. It grew from a handful of criminal investigators to the full-fledged law enforcement agency that it is today. These investigators focus principally on procurement fraud. They are the pre-

mier white collar procurement fraud investigators in the Department of Defense today, and their figures of success over the past several years will certainly bear that out, as I mentioned in my statement.

They have most of the authorities that all law enforcement agents have. They have the right to request that I issue a subpoena, and I do in conjunction with their investigations. They have the authority to carry weapons, and do carry weapons. They are co-located in cities with U.S. attorneys throughout the United States and in Western Europe in 43 or 45 regional offices. I have not had an opportunity to visit them all yet.

We are talking about a law enforcement agency that exists within my own organization today. What I am asking for is some additional authorities to bring them completely within the realm of a full-fledged law enforcement officials within the Federal Government. They are very close to that right now. They are doing most of these things right now. I am suggesting that the ability to subpoena witness testimony would assist them even further. The arrest authority would also assist them on the rare occasions that they would need it—and I do admit that they are rare occasions. Most of the time the FBI is able to assist us. But on those rare occasions when we are unable to get assistance, it would be helpful to be able to make an arrest.

Senator WALLOP. I have to say I have seen what happens, and I am not accusing you or anybody that works for you of this, but I have seen what happens when government gets heavy-handed, and you have somebody defending against legal proceedings of every dimension on every side. Doesn't it worry you at all that somebody has to have a set of lawyers to deal with Justice and a set of lawyers to deal with you? You've got criminal and civil proceedings.

What is the purpose of your office? Is it to garner bigger fines or to provide the stern but fair judgment of the law and compliance with it?

Mrs. CRAWFORD. The authority of my office——

Senator WALLOP. Not the authority. The purpose.

Mrs. CRAWFORD. The purpose of my office is to detect fraud, waste and abuse within the programs of the Department of Defense and to promote economies and efficiencies in its programs. That is a very broad——

Senator WALLOP. So, why isn't one pursuit of those adequate instead of three simultaneously?

Mrs. CRAWFORD. They are three very distinct and different pursuits. Our three main functions are: the investigative function, which is a criminal function; the auditing function, which is of course a non-criminal function; and the inspection function, which is more of a traditional military systemic management review, a subjective management review. Those are the three major areas in which we place our emphasis.

Senator WALLOP. I understand, but as I understood your earlier testimony, you want authority simultaneously to carry on civil and criminal proceedings because under civil you get triple damages and under criminal you don't get as much. That might satisfy somebody's need for revenge, but does it satisfy the country's need

just for the strict and stern administration of the laws against fraud and abuse?

Mrs. CRAWFORD. Let me say that my own organization does not initiate or try the civil cases. That is done by the Department of Justice. We provide support for their efforts, however. Only the Department of Justice carries a civil fraud case forward and, of course, that would be either a trial by jury or trial by judge. The damages would be set in accordance with our existing——

Senator WALLOP. Why does your office want to be a part of a civil proceeding at the same time as a criminal proceeding is going on?

Mrs. CRAWFORD. We certainly have a great interest in seeing that the Government recovers moneys that it has been cheated out of, and the law that permits the U.S. Government to recover triple damages. Certainly, if in the opinion of the Department of Defense——

Senator WALLOP. And under the criminal procedures, what? Just recovery.

Mrs. CRAWFORD. Fines are also allowed for, and restitution.

Senator WALLOP. That is my point. Why wouldn't you just choose between the criminal proceeding and a civil proceeding and carry it out?

The country's interest, first of all, it would seem to me, would be stopping the practice, secondarily to recover. But if you have a criminal proceeding which can recover the country's obligations, as well as inflict a fine, why would you want to pursue something that would also give you treble damages?

Mrs. CRAWFORD. Senator, the choice of which to pursue is not my choice. That choice rests with the Department of Justice. My responsibility, however——

Senator WALLOP. But as I understand you, you want to do them both simultaneously.

Mrs. CRAWFORD. My responsibility is to vigorously investigate all allegations of wrongdoing and fraud and make the results of our investigations available to the Department of Justice—and usually our investigations are done in coordination with that Department. They are joint investigations, but use the resources that I have to assist the Department of Justice in making those choices.

Senator WALLOP. I understand that, but that is not in response to the question that I asked. My time is up, but basically what I am asking is why do you want, or why do you seek, as I read your testimony, authority to conduct both kinds of proceedings simultaneously?

Mrs. CRAWFORD. I already have that authority. I am not seeking additional authority to conduct civil and criminal investigations. I am already doing that. I am seeking additional tools to assist me in conducting those investigations.

Senator WALLOP. Simultaneously.

Mrs. CRAWFORD. Simultaneously.

Senator WALLOP. I worry on that, Mr. Chairman.

Senator BINGAMAN. Let me ask a couple of other questions here. Regarding the release of acquisition information that we are about to get a rule on, I guess I would be interested in any perspective you have about whether that rule should seek to promote competi-

tion by providing broad authority for disclosure or whether we should through that rule put into law substantial restrictions on disclosure. Is there any kind of general statement you can make about that as to which way you think we should lean in that area?

Mrs. CRAWFORD. Yes, Mr. Chairman. My office in the past—and I certainly endorse this position—has argued for the broadest disclosure of information to all competing contractors. With the broadest disclosure of information, what is left undisclosed is much smaller and there is a much smaller opportunity for disclosing information that should not be disclosed.

I think that the playing field should be level for everyone. To the maximum extent possible, we should endeavor to put in the hands of all contractors who may be competing all of the available information to assist them in making their decisions on whether or not to pursue a procurement. So, I would argue for the greatest possible dissemination of information.

Senator BINGAMAN. I asked the earlier panel about profit recapture, and I gathered the testimony that Mr. Beach gave was that there presently is authority—and maybe Mr. Betti as well—within the law for DOD to pursue profit recapture, and that basically they did not think legislative authority for setoffs or withholding or profit recapture was necessary.

Is that your view? Do you think we should try to legislate that, or is that something is adequately covered in the existing law?

Mrs. CRAWFORD. Mr. Chairman, I am not certain that it is adequately covered. What I would request is an opportunity to look at that issue and get back to you on that, if I might, and give you our definite views on whether or not additional legislation may be needed in that regard.

Senator BINGAMAN. Okay, we would appreciate that.

On the certification issue, I am not sure I understood all the points that you were making there, but my general impression was that you favor retaining the certification requirement as it applies to contractors.

Mrs. CRAWFORD. Yes.

Senator BINGAMAN. You think we should eliminate the certification requirements that apply to Government employees.

Mrs. CRAWFORD. That is correct.

Senator BINGAMAN. Is there any other aspect of that that I need to understand? Is my summary too simplistic or is that basically what you said?

Mrs. CRAWFORD. No. That is basically what I said. You stated it much more succinctly than I did, however.

Senator BINGAMAN. On consultants, I guess that you correctly identified the problem, which is how we get agreement between Congress and OMB and the various agencies over this definition of contracted advisory and assistance services. That is the tough part.

Do you have any kind of statement that you could make or give us as to what you think such a definition should include to identify those services that should be performed only by the Government? Is that something that you could shed any light on?

Mrs. CRAWFORD. My office has proposed a definition which presently finds itself in a Department of Defense directive and is very similar with what was promulgated by the Office of Management

and Budget. However, as we know, the Office of Management and Budget is reworking its own regulation, and how that will change I do not know.

Let me call upon Mr. Trodden here on my right who has done a great deal of work in the audit area on the issue of CAAS, as we call it, and ask him to elaborate on that a bit further.

Mr. TRODDEN. Thank you, Mr. Chairman.

The OMB circular to which the Inspector General refers is OMB Circular A-120, which was issued in January 1988. The circular embraces a lot of the definitional content of the 1986 DOD Directive on the same subject. The OMB Circular A-120 of 1988 replaced a 1980 OMB Circular on the same subject, and in our opinion was clearly a step in the right direction. It also moved the definition of contracted advisory and assistance services from a fairly narrow definition to a much broader definition, which includes not only individual consultants and studies as originally defined in 1980, but also engineering services contracts and management support services contracts. It was a much more far-reaching definition of consultant services.

While we could critique the 1988 circular and find that it could be improved, we consider it to be a substantial improvement over the 1980 version.

We are concerned about attempts to retreat from the 1988 definition back to a narrower definition just to reduce the size of the problem.

Senator BINGAMAN. All right. Well, there are a variety of other questions that we may submit to you in writing just to get your reaction on them, if we could.

I think as we proceed through the next several months and try to design legislation to include in the defense bill this year, we would be anxious to hear from you on specific suggestions. We appreciate the specific suggestions you have here in this testimony, and we will take those very seriously and see what we can do. And again, thank you for testifying.

Mrs. CRAWFORD. Thank you, Mr. Chairman.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JEFF BINGAMAN

Senator BINGAMAN. In your testimony, you noted that "the Department of Defense procurement community would benefit from policy guidance concerning withholding of progress and final payments in contracts tainted with fraud. Virtually no guidance exists now."

What timetable, if any, has the Department established for issuance of regulatory guidance on the subject of financial remedies (withholding of progress or final payments, set-offs, and profit recapture) when a contract is tainted with fraud?

Mrs. CRAWFORD. The Department has set no timetable for issuance of regulatory guidance in this area. We have sought to have the DAR Council propose a FAR amendment that would prohibit progress payments on a contract tainted by fraud. We have been advised by the Office of the Under Secretary of Acquisition that "do not believe additional regulatory coverage or contract clauses are necessary to protect the Government's interests."

Senator BINGAMAN. What criteria and procedures should be used, prior to imposing such a remedy, to determine that a contract is "tainted with fraud?"

Mrs. CRAWFORD. We recognize the seriousness of any action that results in suspension of payments to contractors and agree that there should be appropriate criteria and procedures associated with such remedies. We believe that existing criteria and procedures, such as those that relate to consideration of suspension and debar-

ment remedies, can be adopted to provide a framework for implementing this important remedy. Adequate evidence presented to contracting authorities by investigators could form the basis for action.

Senator BINGAMAN. What should be the relationship, if any, between the use of financial remedies and the authority to suspend or debar a contractor?

Mrs. CRAWFORD. As in the case in all instances where evidence of fraud is presented, remedies should be considered in light of the facts involved. In some instances, more than one remedy may be appropriate, depending on the circumstances. The Office of Inspector General has held the consistent position that the coordination of remedies is often key to protecting Government interests in fraud cases. Thus, it may be that both financial and suspension/debarment remedies are selected by the appropriate decision makers in certain instances.

Senator BINGAMAN. You testified that the procurement fraud investigations underscored "the need to ensure that the information developed during the (procurement fraud) investigation (is) made available for noncriminal purposes." You also noted that your "investigative efforts suggested that the Department of Defense needed to better coordinate contractual, administrative, civil, and criminal remedies period."

Please give examples of cases which led you to conclude that better coordination was necessary.

Mrs. CRAWFORD. In a case dealing with false progress payment requests, an Air Force contracting officer repeatedly made payments to a contractor in spite of having been informed by investigators of the suspected fraudulent nature of the claims. Because the contracting officer paid the false claims, the Department of Justice was unwilling to prosecute the contractor on those potential counts. Ultimately, the contractor was convicted for presenting false information to the Air Force suspension and debarment board.

In a case regarding potentially defective aircraft parts, DOD contracting officials concluded that the parts, though not manufactured in accordance with specifications, were still acceptable for use, resulting in a constructive waiver of the contract requirements. Waiving such requirements without coordination with DOD investigators or Department of Justice prosecutors, who are considering fraud charges relating to the parts, may ultimately have an adverse impact on the DOJ decision to go forward.

In another instance, which involved a contractor's failure to calibrate and test navigation equipment on Air Force tanker aircraft, DOD investigators learned that the contractor had never purchased the equipment necessary to perform the calibrations. When the contractor learned that investigators had discovered this, the contractor approached the Air Force, which granted a waiver of calibration test requirement. Prior to granting the waiver, and in spite of their knowledge that the contractor was under investigation, the contracting officials did not coordinate their actions with either the investigators or prosecutors. This waiver had an adverse impact on the decision to prosecute though, ultimately, the contractor was convicted for certain false claims submissions.

Senator BINGAMAN. What structural and other changes would you recommend that the Department—and the executive branch—take to ensure that information developed in the course of a procurement fraud investigation is available for noncriminal purposes and to improve the coordination of procurement fraud remedies?

Mrs. CRAWFORD. I believe that the DOD has a potentially strong structure, if used effectively, in the Points of Contact for Coordination of Remedies as outlined in DOD Directive 7050.5. This structure should be reviewed and considered throughout the Federal Government. The coordination of remedies process will work only, however, if there is communication among all parties concerned, contracting and investigative.

Senator BINGAMAN. Does the Department of Defense have a mechanism in place to ensure Department-wide dissemination and implementation of successful strategies to identify, detect, deter, and prosecute procurement fraud?

Mrs. CRAWFORD. We believe the proper implementation of DOD Directive 7050.5, noted above, is the appropriate mechanism for achieving timely and proper results in fraud cases.

Senator BINGAMAN. Your testimony described a need for statutory authority in four areas: (1) to execute arrest and search warrants; (2) to compel testimony as part of the investigations; (3) to relax the restrictions on sharing grand jury information currently imposed by Rule 6(e) of the Federal Rules of Criminal Procedure; and (4) to provide the Defense Contract Audit Agency with express statutory authority for access to contractors' internal audit reports. For each of these four areas:

Please give specific examples of how the lack of these authorities has impaired your ability to identify, detect, deter, and prosecute procurement fraud.

Mrs. CRAWFORD. In addition to the examples that follow, we have enclosed a paper entitled "Statutory Arrest Authority" and an Inspector General position paper concerning testimonial subpoena power, which address our legislative needs more specifically.

The most glaring example of what could happen when access is not provided to internal audit reports was discussed in Count 1 of the plea agreement of Sundstrand Corporation. The plea agreement notes that Sundstrand ordered or caused to be ordered Sundstrand employees to destroy an internal report and workpapers, which suggested that Sundstrand's practice of concealing cost overruns on design and development contracts, as well as other mischarged development costs, was not in compliance with Government regulations. Access to internal audit reports would have uncovered the contractor's scheme much earlier and significantly reduced the harm to the Government and the efforts expended to uncover and prosecute the Sundstrand Corporation for these fraudulent practices.

At General Dynamics Corporation, Electric Boat Division, the auditor's access to the internal audit reports and Board of Director's minutes resulted in audit savings of $2 million. The auditor questioned and saved the added cost from foreign currency translation, which was not a recoverable cost. These unallowable costs were found through access to the internal audit reports and Board minutes.

Senator BINGAMAN. If these provisions were enacted, what management safeguards and internal controls will you establish to protect against the abuse of these authorities?

Mrs. CRAWFORD. Regarding investigative tools, we will develop effective internal procedures appropriate to the authority granted, as we have, for example, in the issuance of documentary subpoenas and use of firearms. We note that in issuing more than 3,000 Inspector General subpoenas, we have never been found to have violated anyone's rights or abused the process. The enclosed Inspector General position paper on testimonial subpoenas discusses the important safeguard issue more fully.

There are management controls and safeguards already in place to preclude contract auditors from overreaching their audit rights. First, the Inspector General, DOD, has oversight and policy responsibility for contract audits. The Inspector General has an Assistant Inspector General for Audit Policy and Oversight who continuously oversees contract auditors and monitors contract auditors performance. Second, the contractors have the courts and the Armed Services Board of Contract Appeals available when they feel auditors exceed their authority.

Senator BINGAMAN. How frequently do you anticipate that these authorities would be used?

Mrs. CRAWFORD. It is difficult to predict how often these important tools will be used, as each would depend on the specific facts of the matter under investigation and how many such investigations arise during the course of a year.

Senator BINGAMAN. How does your existing authority compare to that possessed by other Inspectors General?

Mrs. CRAWFORD. We have no additional authorities than those granted to any of the Inspectors General.

POSITION PAPER

Testimonial Subpoena Authority for the Inspector General, Department of Defense

Introduction

In uncovering fraud, waste, and abuse, the Defense Inspector General conducts investigations and receives evidence utilizing her statutory documentary subpoena power. However, documents alone are rarely sufficient to take even the most innocuous administrative actions since the reason for the document's creation and the intent of the maker must be demonstrated to at least some degree. In short, the documents must be explained. Often, it is only with testimony that any corrective action can be taken.

Currently, the only mechanism available to compel testimony is through a criminal grand jury. However, the Supreme Court has absolutely barred the use of grand jury testimony in any other than a criminal proceeding absent extraordinary and compelling circumstances. (United States v. Sells Engineering, 463 U.S. 418 (1983)) Thus, unless all testimonial evidence is entered into the record in open court, presuming that a matter does go forward to a criminal trial or plea, that information is forever unavailable to the government to correct program deficiencies or to invoke any administrative remedies, such as suspension, debarment, or recoupment of lost taxpayer funds.

The recognized value and use of testimonial subpoenas by all branches of government, with particular emphasis on their application to the important work of the Defense Inspector General, are discussed in this paper and recommended legislative initiatives are detailed. For further information, please contact David R. Glendinning, Office of the Inspector General, Department of Defense, at (202) 694-8961.

Subpoenas to Compel Testimony

In a decision relating to the exercise of subpoena power by the Congress, the Supreme Court, in 1927, declared it to be an "indispensable ingredient" of the legislative power:

> "Experience has taught that mere requests for information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." (McGrain v. Daugherty, 273 U.S. 135, at 175 (1927))

The needs of the Executive Branch, particularly those agencies charged with uncovering waste, fraud, and abuse, in pursuing matters outside the criminal justice system are no less important. Indeed, Congress has given Federal agencies, boards, and commissions the power to compel testimony in administrative inquiries and investigations through some 70 statutory enactments. (Enclosure 1)

Grants of testimonial subpoena power fall into two broad categories: 1) Subpoenas by boards or hearing officers; and, 2) Subpoenas by investigators. Most Executive Branch agencies possess at least one type or the other; some agencies have multiple authorities. The Congress provides both types for its own use by committees as part of the hearing process and by individuals employed by the Congress to conduct investigations under the authority of a committee. (See, Rules of Procedure, Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, February 28, 1989, S. Res. 66, 101st Congress, 1st Session, Sec. 13(a))

Subpoenas issued by boards or hearing officers most frequently involve the attendance of a witness to provide testimony on a matter "in controversy" or under review. Those matters may also be under criminal investigation simultaneously.

An investigative subpoena orders the witness to appear before an investigator who is gathering facts preliminary to the matter being "in controversy" or the filing of charges. The most prevalent use of this type of subpoena is probably by Internal Revenue Service agents examining tax records prior to a referral to the Department of Justice for criminal prosecution or civil enforcement. Other examples include Securities and Exchange Commission investigations, Housing and Urban Development Department agents investigating land sales, and investigations by the National Oceanic and Atmospheric Administration of violations of the Northern Pacific Halibut Act of 1982.

Hearing-type subpoenas would be of limited use to an IG because of the need to convene formal hearings presided over by the IG or some other administrative officer who might be put in the awkward position of having to impartially rule on objections by the subpoenaed party. Other problems such as, arguably, the right of a subpoenaed party's attorney to conduct cross-examination and other requirements of the Administrative Procedures Act (which itself may not be applicable to DoD) greatly limit the useof this form of testimonial subpoena power.

On the other hand, investigative testimonial subpoenas do not present procedural conflicts of interest and are well-settled factfinding techniques used by all branches of

Government. The Congress, as noted, has granted itself extensive power to compel testimony of witnesses, both in conjunction with hearings and as part of a committee investigation. Indeed, the broad Congressional subpoena power contains few, if any, procedures for appeal by the subpoenaed party outside the issuing committee itself. In contrast, the subpoena power given the Executive Branch by Congress is fairly restrictive in most instances and replete with procedural appeal routes and protections, both by statute and judicial interpretation.

The grant of testimonial subpoena power to the Inspector General, Department of Defense, is essential to effectively gather evidence necessary to counter fraud and abuse in Department programs.

Executive Branch Use of Testimonial Subpoenas

The Government's right to require the assistance of persons believed to have information relevant to a matter under review has been judicially limited to ensure that such power is not abused and that protections of due process are afforded subpoenaed parties. These requirements were formally enunciated by the Supreme Court in United States v. Powell, 379 U.S. 48 (1964), a case which involved an IRS summons. The Court held that the summons must meet four factors: 1) issued for a legitimate purpose; 2) information sought must be relevant to the inquiry; 3) the Government may not already have the information; and 4) administrative requirements of issuing the summons must have been met. These "Powell factors" have been used by other courts as a test of legitimacy for a variety of Federal summonses and subpoenas.

Certainly, the fewer procedural hurdles to overcome in issuing a summons or subpoena, the more effective its use becomes. However, the need to reduce procedural burdens must be balanced with respect for individual rights to privacy and against self-incrimination. Recognizing this, all presently authorized subpoenas are subject to challenge in Federal court and, absent grants of immunity, in no instance can an individual be made to testify on a matter considered by the person to be potentially incriminating.

The IRS summons is a good example of presently available authority to gather witness testimony with streamlined administrative requirements. In employing the summons authority (as limited by the Supreme Court) almost any IRS employee above the grade of GS-9 can (by delegation) draft and serve a witness summons on a taxpayer or other person with information potentially relevant to an official tax inquiry. (See, 26 U.S.C. Section 7602.) Only after the investigation has been formally referred to the Department

of Justice for criminal prosecution or grand jury action is the summons prohibited.

Perhaps the first "modern day" grant of almost unlimited witness subpoena power coincidentally related to investigations of Defense procurement fraud. In the Second War Powers Act of 1942 (50 U.S.C. App. Section 643 (a)), the 77th Congress granted to the President (and his designees) near blanket authority to compel witness testimony in support of investigations, audits, and inspections of war materiel procurement. The only restrictions were that the production of documents could not be forced outside the place where the person whose records were sought transacted business or resided. The Act also provided for payment of appropriate witness fees and attached criminal penalties for failure to respond to the subpoena.

As noted, some 70 statutory authorities presently exist for Executive Branch agencies to require the attendance of witnesses in a variety of administrative inquiries. Certainly, the work of the Defense Inspector General is no less important than, for example, that of Federal workers empowered by Congress to investigate, with testimonial subpoenas, potential violations of car bumper safety requirements.

Investigations Are Impaired by Lack of Testimonial Subpoena Authority

Over the past five years, Congress has provided a variety of new remedies to redress instances of fraud in the procurement process. Enhanced administrative penalties for violations of the Truth in Negotiations Act and the Program Fraud Civil Remedies Act of 1986 are just two examples. As important as these remedies are, however, without the ability to gather sufficient evidence to demonstrate that a violation has occurred, they may never be as effectively implemented as Congress has intended.

Particularly in a procurement fraud matter, evidence of contractor wrongdoing which is based primarily on the collection of a mass of documents is rarely sufficient to sustain the burden of proof required in even an administrative suspension or debarment action. It takes witness testimony to explain why the documents were created and just what they purport to show. The requisite knowledge on which findings of liability are based is established, in many instances, by conversations a person had with employees, co-workers, or others. In the absence of testimonial evidence, proof of knowledge or intent, and ultimately the fraud case itself, may be lost.

The Government's need for such testimonial evidence to establish liability is certainly understood by Defense

contractors and many have taken steps which, if not intentionally prohibit, serve to discourage their employees from discussing any aspect of their firms' business with Government auditors or investigators. (Enclosure 2.)

Two examples of instances where testimonial subpoena authority was needed by the IG, DOD are found in cases relating to Bell Helicopter Textron and Ford Aerospace and Communications.

In the Bell Helicopter case, an IG subpoena was issued to gather contractor records and resulted in the receipt of literally tens of thousands of documents for which interpretive discussions and explanations were necessary. When a request for explanation was made to the company, Bell Helicopter produced a newly hired employee who stated that the records were gathered under his direction but he was not able to provide any meaningful information regarding their creation or purpose. What testimony was eventually developed regarding the records was done so within the grand jury, which was not available for DoD to use in taking administrative action or to further the audits and investigations which led to the grand jury inquiry. Indeed, since that case did not result in a criminal conviction but, rather, in a settlement offer by the company, none of the grand jury information relating to the creation of the records can ever be shared with contract administrators or auditors.

The Ford Aerospace investigation was initiated after three DCAA audits determined Ford had received excessive profits on three separate contracts with the Government. During the course of the investigation, a total of 85 boxes of records were obtainedand reviewed. When it came time to seek explanations of the records, the agents were forced to focus their efforts only on a criminal remedy because they could only gather the necessary information through grand jury subpoenas. This also considerably delayed the investigation (it took almost four and a half years) and, because grand jury information is not available outside a criminal prosecution, this restricted Government options to resolve the underlying pricing matter.

Department of Justice Prior Approval of IG Subpoenas

There are at least two compelling reasons to reject the notion that the Department of Justice should have an approval role in the issuance of any subpoena by the Inspector General, DoD. As a matter of policy, internal Department of Defense procedures should not be subject to approval by another Department of the Executive Branch. In fact, no other Department is currently required by statute to coordinate their subpoenas with DOJ and we know of no

instance where that has caused any of the problems currently imagined. As a matter of law, Department of Justice approval of a DoD subpoena may cause the subpoena to be held improper by the courts or, worse, unconstitutional. If pre-approval screening were required, investigative targets would assert in their motions to quash that DoD is acting merely as a "stalking horse" for DOJ prosecutors and not for its own administrative interests. In fact, that very argument was raised by Aero-Mayflower Van lines in challenging an IG, DoD documentary subpoena. The challenge arose in the context of an enforcement proceeding brought by the Government based on the van lines refusal to supply subpoenaed documents. They claimed that the IG, DoD was working at the direction of the Antitrust Division of the DOJ and was thus using the IG subpoena power for an improper purpose not related to a DoD interest. The court ruled in favor of the Government, finding that the IG was pursuing its own review of antitrust matters. (United States V. Aero-Mayflower Transit Co., 831 F. 2d 1142 (D.C. Cir. 1987)) However, had the subpoenas been subject to prior approval by DOJ, the complaining companies may well have succeeded with their motions to quash.

If Congress ultimately determines that DOJ must be involved with the issuance of IG testimonial subpoenas, that involvement should be limited to the usual coordination process to ensure that local U.S. Attorneys are provided with information copies of the subpoena at least 10 working days prior to service so that any objections they may have can be considered and discussed. Ultimately, however, the decision on service must be with the IG.

In addition, the testimonial subpoena power should be delegable at least from the IG to the Deputy IG as is current practice with documentary subpoenas. There are advantages to making it delegable to "any responsible officer or employee" so that the Assistant Inspectors General for Investigations and for Investigations Policy and Oversight would be able to issue subpoenas for the various DoD investigative elements. However, limiting delegation to the Deputy IG has proven workable, though not ideal.

Arguments Against Testimonial Subpoena Authority

A number of objections have been raised, principally by organizations speaking on behalf of Defense contractors, in opposition to any grant of testimonial subpoena power to the IG, DoD. The arguments are as follows: 1) The power is unnecessary. Many new remedies, including the Program Fraud Civil Remedies Act, do not even require proof of intent to defraud so testimony is not important to building a case; 2) Grant of this power will threaten the civil liberties of all citizens by overzealous agents on "fishing expeditions" who can unilaterally call for testimony anywhere, anytime;

3) Not even the FBI, the nation's principle law enforcement agency, has this power; 4) Its use in administrative or civil violation investigations will interfere with the criminal investigation process of U.S. Attorneys.

Examining each of the objections in context with current judicial interpretations regarding the existing 70 testimonial subpoena statutes as well as the legislative alternatives available, it becomes clear that no good reason exists to deny this essential tool:

1) The power is necessary. Even with the lesser standard of proof required under many statutes, "knowledge" remains a requirement for liability, even in Program Fraud proceedings. The ability to gather testimonial evidence is absolutely essential to understand the meaning behind mere documents, particularly when the maker's state of mind is at issue. Additionally, in the context of non-criminal investigations (such as those under the Civil False Claims Act) without the authority to compel testimony, the ability to conduct a full investigation and thus maintain even a civil prosecution is severely limited. Indeed, even if a grand jury uncovers civil violations, without the return of a public indictment incorporating every aspect of the underlying evidence, not even the Department of Justice can pursue the matter.

2) The power will not be abused. There are substantial protections against abuse of subpoenas built into the statutes which authorize them and through judicial interpretations. The "Powell factors" mentioned earlier are just some of the tests which subpoena orders are put to. The notion that agents can somehow indiscriminately order citizens to appear anytime, anywhere is just not true and can be easily prevented by appropriate restrictive language in the enabling legislation. In addition, there is no evidence to support the contention that the IG would abuse its subpoena authority. The IG, DoD has issued literally thousands of documentary subpoenas and in no instance has there been a finding by any Federal court that even suggests abuse. Further, each subpoena must be approved by the IG or Deputy IG after General Counsel review and must be fully supported by case background information, justification, and a statement of necessity.

3) The FBI argument is a red herring. The statement that the FBI does not itself have testimonial subpoena authority is true. In fact, the FBI does not even have documentary subpoena authority, but that did not deter Congress from authorizing it to the IG, DoD. The reason for the FBI not having its own subpoena power is simply that such a grant would be redundant. The FBI is exclusively a criminal investigative agency and as such pursues cases only through the grand jury, where both documents and testimony

are compelled on their behalf. In the rare instance where the FBI conducts a non-criminal inquiry, such as working jointly on a DoD procurement matter (which may have criminal potential), they depend on IG subpoenas issued to our investigators to gather necessary documents.

4) It will not interfere with criminal cases. IG agents coordinate all investigations with the appropriate Department of Justice element during the course of their inquiries. It is, therefore, extraordinarily unlikely that interference with other matters will occur. Nevertheless, statutory language requiring coordination with the DOJ would not be objectionable, so long as that does not amount to an approval right, which would be considered as improper as if the Congress had to obtain approval from the Department of Justice to conduct its investigations as it sees fit, within the bounds of required due process.

Alternative Proposals

Following are proposed statutes which could be used in developing legislation granting testimonial subpoena authority to the IG, DoD. These examples are by no means intended to be final proposals, nor are they examples of all possible testimonial subpoena forms which would be useful and acceptable to the IG, DoD. They are only beginning points and each can be easily changed to include other provisions.

Proposal 1

> "Insert, at Title 5, United States Code, Appendix 3, Section 6 (a) (4), following the words 'to require by subpoena', the following: 'the attendance and testimony of witnesses and'."

This proposal follows present documentary subpoena power by merely amending the IG Act and thus preserves the attendant judicial interpretations, policy statements, procedural requirements, etc. and would be most easily implemented.

Proposal 2

> "Insert, at Title 5, United States Code, Appendix 3, after Section 6 (d) the following new section: (e) In addition to the authority otherwise provided by this Act, the Inspector General, Department of Defense, or designee, is authorized to subpoena witnesses and compel their attendance and testimony. Such attendance

> may be required from any place in the United States or, for United States citizens outside the United States, from where they reside. In case of contumacy by, or refusal to obey a subpoena to, any person, the Inspector General, Department of Defense, may invoke the aid of any court of the United States within the jurisdiction of which the underlying investigation, audit, or inspection of the Inspector General is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of such witness; and such court may issue an order requiring such person to appear or to give such testimony touching the matter under inquiry. Any failure to obey such order of the court may be punishable by such court as a contempt thereof. All process in any such case may be served in the judicial district where such person is an inhabitant, conducts business, or wherever he may be found."

This language limits testimonial subpoenas to the IG, DoD or designee and tracks the subpoena language found in existing statutes for other Executive Branch agency investigations, such as those conducted by the Department of Agriculture under the Egg Research and Consumer Information Act (2 U.S.C. Section 2717).

Proposal 3

> "Insert, at Title 5, United States Code, Appendix 3, after Section 6(d), the following new section: (e) (1) In addition to the authority otherwise provided by this Act, the Inspector General, Department of Defense, or the Deputy Inspector General, Department of Defense, is authorized to subpoena witnesses and, through an order of an appropriate United States court, compel their attendance. (2) The Inspector General or Deputy shall not issue a subpoena under paragraph (1) until ten business days after notification to the United States Attorney for the judicial district in which such subpoena is to be returned."

This proposal limits testimonial subpoena power to only the IG and Deputy IG at DoD and includes a provision to notify a DOJ element ten days before service so that

concerns/objections can be raised by the U.S. Attorney who would likely be most impacted by the effect of such a subpoena.

These proposals do not restrict the issuance of testimonial subpoenas to only non-government personnel, as some other legislative drafts have. Since presently, the Inspector General can subpoena personal books and records of a Government employee, there is no good reason to restrict subpoenas for their personal testimony.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
5 U.S.C. § 1205	Merit Systems Protection Board	Investigations relating to hearings within its jurisdiction
5 U.S.C. § 1507	Merit Systems Protection Board	Investigations of political activity of certain state and local employees
5 U.S.C. § 7131	Federal Labor Relations Authority	Investigations within its jurisdiction
7 U.S.C. § 15	Commodity Futures Trading Commission	Investigations under the Commodity Exchange Act, 7 U.S.C. § 1 et seq.
7 U.S.C. § 87f	Administrator of the Federal Grain Inspection Service	Investigations under the United States Grain Standards Act, 7 U.S.C. §§ 71 et seq.
7 U.S.C. § 511n	Secretary of Agriculture	Tobacco inspection
7 U.S.C. § 2115	Secretary of Agriculture	Investigations under the Cotton Research and Promotion Act, 7 U.S.C. 2101 et seq.
7 U.S.C. § 2622	Secretary of Agriculture	Inspections under the Potato Research and Promotion Act, 7 U.S.C. §§ 2601 et seq.
7 U.S.C. § 2717	Secretary of Agriculture	Investigations under the Egg Research and Consumer Information Act, 2 U.S.C. §§ 2701 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
7 U.S.C. § 2917	Secretary of Agriculture	Inspections under the Beef Research and Information Act, 7 U.S.C. §§ 2901 et seq.
7 U.S.C. § 3412	Secretary of Agriculture	Investigations under the Wheat and Wheat Foods Research and Nutrition Education Act, 7 U.S.C. §§ 3401 et seq.
7 U.S.C. § 4317	Secretary of Agriculture	Investigations under the Floral Research and Consumer Information Act, 7 U.S.C. 4301 et seq.
7 U.S.C. § 4511	Secretary of Agriculture	Investigations under the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501 et seq.
8 U.S.C. § 1446	Attorney General or Immigration and Naturalization Service	Investigation of naturalization petitioner
12 U.S.C. § 1464	Federal Home Loan Bank Board	Investigations with respect to Federal Savings and Loan Associations
12 U.S.C. § 1730	Federal Savings and Loan Insurance Corporation	Examinations of insured institutions
12 U.S.C. § 1786	National Credit Union Administration Board	Investigations of insured credit unions
12 U.S.C. § 1818	Bank supervisory agencies	Investigations connected with the Federal Deposit Insurance Corporation programs
12 U.S.C. § 2404	National Commission on Elections Transfer	Investigations within its jurisdiction

STATNER

STATUTORY ARREST AUTHORITY

While our investigators are accredited Federal law enforcement officers, who conduct a broad variety of criminal investigations in the areas such as procurement fraud, theft and other Government fraud cases similar to those conducted by the FBI, they do not have certain basic powers, which are needed to effectively conduct criminal investigations. While DCIS agents are authorized by Title 10 of the USC to carry weapons, apprehend military personnel, and to detain civilians on military bases, they do not have the authority to arrest civilians. Statutory arrest authority is provided to a broad variety of State and Federal investigative organizations. It has also been provided by Congress to three of the statutory Inspectors General: Agriculture, General Services Administration and the Postal Inspector Service. Cogent reasons exist for such authority to be granted to DCIS investigators.

The primary mission of the Inspector General, Department of Defense investigators is procurement fraud, and therefore, the targets of most DCIS investigations are civilians. These investigations include sensitive undercover operations, surveillance, interviewing potentially dangerous suspects and witnesses, serving Inspector General and Grand Jury subpoenas on hostile witnesses, and the tracking down of fugitives. These situations are potentially fraught with danger and may involve violent confrontations with armed suspects. While our agents are statutorily authorized to be armed, and are trained to use firearms, they should not be required to be exposed to physical danger unless they also have the authority to arrest persons who seek to obstruct their investigations. Last year alone, DCIS served 417 Inspector General Subpoenas, over 1,000 Grand Jury Subpoenas, conducted 144 consensually monitored interceptions of communications, and participated in 24 undercover operations. In virtually every one of the 600 indictments obtained by DCIS in the last two years, a civilian was the subject of the indictment. However, in each case when an arrest was made, DCIS was required to obtain the assistance of another Federal or State law enforcement agency in order to make the necessary arrest. This resulted in numerous unneeded delays in effectuating the arrests.

Furthermore, under Presidential authority and Department of Justice regulations, DCIS agents are fully authorized to apply for and execute Federal search warrants. Pursuant to this authority, DCIS agents executed over 60 search warrants last year. Because obstruction of the execution of the search warrant is a possibility in each case, and because DCIS investigators have no authority to make arrests for such an obstruction, as a

matter of formal IG policy and good investigative judgement, we were required to obtain the assistance of another Federal or State law enforcement organization in order to execute every search warrant. In addition to the unneeded delays in obtaining this assistance, which enables subjects to flee or destroy evidence, the requirement for the participation of multiple agencies has resulted in tying up the assets of both agencies for days at a time., Searches of contractor production facilities and warehouses often take days to complete, and require special training to accomplish. While DCIS agents are available and have been trained for this purpose, other Federal and State agencies are reasonably hesitant to provide their personnel for lengthy searches when the only reason for their presence is to provide arrest authority.

The DCIS agents are accredited Federal criminal investigators. They are trained at the Treasury Department's Federal Law Enforcement Training Center, or other accredited Federal training academies, and provided with the same comprehensive training regarding arrests that is provided to other Federal law enforcement agencies.

While we have sought to alleviate the problem caused by our lack of arrest authority, by conducting joint investigations with other Federal agencies or obtaining Special Deputy U.S. Marshal status, we do not believe that these alternatives are viable options. Many of our cases are conducted jointly with one or more of the military criminal investigative organizations. However, since their authority is identical to our own, we are often required to involve still other agencies in order to obtain the full authority we require. While we encourage our agents to work joint cases with other Federal agencies who have full law enforcement powers, these other agencies are often unavailable, and the narrow window of opportunity in which to conduct a search or make an arrest may be lost. The Office of Inspector General is ultimately and primarily responsible or the investigation of fraud in DoD programs and operations, and, as such, should not be required to rely on the arrest authority of other Federal agencies in order to effectively accomplish our mission.

Furthermore, while we have sought to have some of our agents appointed as Special Deputy U.S. Marshals, we have found this process to be unresponsive to our needs. Currently, fewer than 15 of the over 300 DCIS agents have Deputy Marshal status. The appointment process often takes in excess of four months to accomplish, and even when it is provided, it is for one agent at a time, on one case at a time. We have had instances where agents who were deputized on one case were needed to assist other agents in the same office on the execution of a search warrant on a different case. Because the agent did not have Special Deputy Marshal status on the second case, we were forced to obtain the assistance of another Federal agency to complete the search.

In a recent case, conducted jointly with the FBI and one of the military criminal investigative organizations, one of our agents was granted Deputy Marshal status. Numerous arrests were made, including some involving armed suspects. Based on the fact that additional agents were needed on the case, we obtained the support of the local U.S. Attorney and U.S. Marshal to have an additional agent given Deputy Marshal status. After a four-month delay, the request was denied by the Department of Justice.

It should be noted that all of the investigators at the Department of Interior, Office of Inspector General, are deputized, as well as 20 or more investigators at the Offices of Inspector General at Education, Health and Human Services and Transportation. It should be noted also that the Department of Justice has recently provided blanket Deputy U.S. Marshal status to all the investigators assigned to the Justice Department's Office of Inspector General.

For these reasons, we request this committee to provide our investigators with the full authority needed to accomplish their assigned responsibility. We need statutory authority to make arrests in order to continue with our mission against fraud in DoD.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
12 U.S.C. § 2617	Secretary of Housing and Urban Development	Investigations under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.
15 U.S.C. § 57b-1*	Federal Trade Commission	Investigation of unfair or deceptive methods of competition
15 U.S.C. § 77s	Security and Exchange Commission	Investigations under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq.
15 U.S.C. § 77uuu	Securities and Exchange Commission	Investigations under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa et seq.
15 U.S.C. § 780	Securities and Exchange Commission	Investigations under the Securities Exchange Act of 1934, 15 U.S.C. §§78a et seq.
15 U.S.C. § 79r	Securities and Exchange Commission	Investigations under the Public Utility Holding Company Act of 1935, 15 U.S.C §§ 79 et seq.
15 U.S.C. § 80b-9	Securities and Exchange Commission	Investigations relating to investment companies and advisors under 15 U.S.C. §§80b-1 et seq.
15 U.S.C. § 80a-41	Securities and Exchange Commission	Investigations relating to investment companies and advisors under 15 U S.C. §§ 80a-1 et seq.
15 U.S.C. § 634	Small Business Administration	Investigations under the Small Business Act, 15 U.S.C 631, et seq.

*Civil investigative demand

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
15 U.S.C. § 687b	Small Business Administration	Investigations relating to revocation of license granted under 15 U.S.C. § 671 et seq.
15 U.S.C. § 717m	Secretary of Energy	Investigations under the natural gas provisions of 15 U.S.C. §§ 717 et seq.
15 U.S.C. § 772	Secretary of Energy	Investigations under the Federal Energy Act of 1974, 15 U.S.C. §§ 761 et seq.
15 U.S.C. § 1312[a]	Attorney-General or Antitrust Division of Department of Justice	Civil antitrust investigation
15 U.S.C. § 1401	Secretary of Transportation	Investigations under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 et seq.
15 U.S.C. § 1714	Secretary of Housing and Urban Development	Investigations under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq.
15 U.S.C. § 1825	Secretary of Agriculture	Investigations under the Horse Protection Act, 15 U.S.C. §§ 1821 et seq.
15 U.S.C. § 1914	Secretary of Transportation	Investigations to carry out the bumper standards law; Cost Saving Act, 15 U.S.C. §§ 1961 et seq.
15 U.S.C. § 1944	Secretary of Transportation	To carry out the purposes of the automobile consumer information study law, 15 U.S.C. § 1941 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
15 U.S.C. § 2005	Secretary of Transportation the Environmental Protection Administrator	Investigations under the law requiring fuel economy standards, 15 U.S.C. § 2001 et seq.
15 U.S.C. § 2076	Consumer Product Safety Commission	Investigations within its jurisdiction
15 U.S.C. § 4013x	Attorney General or Antitrust Division of Department of Justice	Investigations connected with issuance of export trade certificates of review
16 U.S.C. § 773 i	Secretary of Commerce	Law enforcement investigations under the Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773 et seq.
16 U.S.C. § 825f	Secretary of Energy and the Federal Energy Regulatory Commission	Investigations under the Federal Power Act, 16 U.S.C. §§ 791 et seq.
18 U.S.C. § 1968*	Attorney General	Racketeer Influenced Corrupt Organizations (RICO) statute investigations
19 U.S.C. § 2321	Secretary of Labor	Investigations connected with trade adjustment assistance
21 U.S.C. § 876	Attorney General	Investigations relating to controlled substance law under 21 U.S.C. §§ 801 et seq.
21 U.S.C. § 967	Secretary of the Treasury	Investigations relating to smuggling of controlled substances
22 U.S.C. § 287c	Secretary of Treasury	Investigations relating to Rhodesian sanctions

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
22 U.S.C. § 1622	Foreign Claims Settlement Commission	Investigations of claims within its jurisdiction
22 U.S.C. § 2824	Commission on the Organization and Conduct of Foreign Policy	Investigations within its jurisdiction
22 U.S.C. § 3004	Commission on Security and Cooperation in Europe	Investigations within its jurisdiction
29 U.S.C. § 161	National Labor Relations Board	Investigations relating to representative elections and unfair labor practices
29 U.S.C. § 1303	Pension Benefit Guaranty Corporation	Investigations Under the Employee Retirement Income Security Act of 1924, 29 U.S.C. §§ 1301 et seq.
29 U.S.C. § 1862	Secretary of Labor	Investigations under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq.
30 U.S.C. § 1717	Secretary of Interior	Investigations under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 et seq.
33 U.S.C. § 506	Secretary of Transportation	Investigative hearings relating to reasonableness of bridge tolls
33 U.S.C. § 1907	Secretary of Transportation	Investigations under the Act to Prevent Air Pollution from Ships, 33 U.S.C. §§ 1901 et seq.
38 U.S.C. § 3311	Administrator, Veterans Administration	Aid to claimants making claims investigations of any matter within jurisdiction of the Veterans' Administration

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
42 U.S.C. § 405	Secretary of Health and Human Services	Investigations under Title II of the Social Security Act, which concerns federal old-age, survivors, and disability insurance benefits
42 U.S.C. § 5413	Secretary of Housing and Urban Development	Investigations relating to functions under the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 et seq.
45 U.S.C. § 40	Secretary of Transportation	Investigations connected to railway accidents
45 U.S.C. § 362	Railroad Retirement Board	Investigations within its jurisdiction
46 U.S.C. § 1124	Secretary of Commerce	For functions under merchant marine legislation, 46 U.S.C. §§ 1101 et seq.
46 U.S.C. App. § 1717	Advisory Commission on Conferences in Ocean Shipping	To carry out its functions
47 U.S.C. § 409	Federal Communications Commission	Investigations under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq.
49 U.S.C. § 502	Secretary of Transportation	Investigations under legislation relating to motor carriers of migrant workers

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
49 U.S.C. § 305	Interstate Commerce Commission	Investigations within its jurisdiction under the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq.
49 U.S.C. § 10321	Interstate Commerce Commission	Investigations under part II of the Interstate Commerce Act, 49 U.S.C. § 302 et seq. relating to motor carriers
50 U.S.C. App § 643a	Any federal agency involved as the Chairman of the War Production Board	Investigation of war contracts
50 U.S.C. App § 2001	Foreign Claims Settlement Commission	Investigation under the War Claims Act of 1948

Bell Aerospace TEXTRON
Division of Textron Inc.
Post Office Box One
Buffalo, New York 14240

INTEROFFICE MEMO

26 November 1984

TO: Messrs. P. B. Gannon, U. E. Hilger, J. J. Kelly, R. A. Norling, J. B. Timbrell

SUBJECT: Government Audit Activity

The IG has noticed NOO and NFO of its intention to inspect a specific number of contracts. It is imperative that all communication with the IG should be specifically regulated.

The following shall be the Bell Aerospace policy with respect to any IG inspections:

1. The attorney contact between BAT and IG is J. Hedges, 716-696-6916. This shall be the sole point of contact with the IG for BAT.

2. All questions directed to Bell employees by the IG shall be referred to the attorney contract for coordination of the reply.

3. Any request for written material which may be received from the IG or DCAA concerning matters under investigation by the IG shall be referred to the attorney contact for action.

4. The affected Operations shall appoint an interface representative to work with the attorney contact to assemble any information to be released to the IG. All information which may be subject to the investigation may be released with the approval of the attorney contact.

5. Attorney Client Privilege shall be maintained within the Division concerning all matters pertinent to the investigation.

6. In order to maintain Attorney Client Privilege, employees should not discuss any matter under investigation of the IG with any person including other Company employees except the attorney contact, or under his direction.

BELL AEROSPACE TEXTRON
Interoffice Memo

Government Audit Activity — 26 November 1984
Page 2

7. Any efforts by IG or DCAA to communicate directly with a Division employee should be communicated to J. Hedges (6916) including the time of the contact, and information requested.

8. Advise the attorney contact of any action by the IG affecting the Company which becomes known to an employee.

N. E. Willcox
President

GENERAL ELECTRIC
DOMESTIC APPARATUS AND ENGINEERING SERVICES DIVISION

• MAIL ADDRESS:
DAESD-Legal Operation
One River Rd, Bldg 6-202
Schenectady, NY 12345

• TELEPHONE:
8*235-3720

January 30, 1986

TO: All Employees of ASD and Richmond Apparatus Service Shop

The purpose of this letter is to inform you of GE's position with regard to interviews by Department of Defense Inspector General auditors when accompanied by a GE Finance Representative. (At all other times, when an ASD employee is approached by a an employee of the Inspector General's office or an FBI agent, the employee should first call the ASD Legal Operation prior to talking with any of the aforementioned Government officials.)

The GE Finance Representative (Rep) will be in charge, in that no interview will take place without the Rep and the Rep will be able to end the interview at any time. In addition, the Rep will be able to independently ask questions of the employee to ascertain the accuracy and completeness of any response given by the employee, as well as to clarify any unclear questions asked by the DODIG auditor.

The purpose of the audit is to determine whether the Company and its employees have complied with all applicable laws and regulations in negotiating and administering contracts with the U.S. government. The questions should be factual in nature-that is, the questions should ask the employee what the employee actually knows of his or her own personal knowledge concerning a specific job, job element or record.

GE's position is that the employee should try to give accurate, complete and responsive answers to all questions asked by the auditor and not objected to by the Rep. However, it should be clear that accuracy and completeness can only occur when the employee is sure of the meaning of the question and clearly knowledgeable of the subject matter. If the question is unclear, ask the auditor to be more specific until you are satisfied that you know what is being requested of you. Also, employees are specifically directed not to speculate or guess about the answer. If you know the answer, say so. If you don't know the answer, say "I don't know." If you are unsure of the answer, you have the right to say "I'm not sure" and confer with the Rep. The auditor will allow you to develop the answer with the Rep after the initial questioning is over, and you can get back to the auditor at a later time with an accurate and complete response.

You, therefore, have three options in answering a question:

(1) if you are sure you know the answer, you can give the information at once;

(2) if you are sure you don't have any information on the subject, you can say "I don't know;" and

(3) if you need time to develop an answer by reviewing your files, you can defer any response until you and the Rep can develop an accurate and complete response.

Again, discuss only those matters which you know about; don't try to guess or speculate about other people's activities or other matters outside your actual knowledge.

Finally, you should be aware that false information knowingly given to Government officials or evidence of intentional mischarging may give rise to criminal charges. The Government has been more active in recent years in pursuing such matters in the courts. You do not have to grant interviews, and GE is not going to force you to do so. The choice to grant an interview is a personal choice. However, GE requires its employees to comply with all GE and DAESD policies and encourages its employees to discuss, in a controlled environment, their efforts to comply with these policies. Any employees who feel that they cannot grant an interview should discuss the matter with ASD Legal Counsel at their earliest convenience.

Very truly yours,

William P. Thornton Jr.

William P. Thornton, Jr.
Counsel
Apparatus Service Department

WPT:cma

FILING GIVEN 4-25-84

Boeing Commercial Aircraft Co.

To: All BCAC Salaried Employees

Subject: Unannounced/Unscheduled Audits by U.S. Government Auditors and Investigators

Scheduled audits by U.S. Government auditors are conducted periodically in a number of BCAC areas. Finance organizations have the responsibility to inform supervision in those affected areas prior to the start of the audit.

The following instructions are provided if U.S. Government auditors or investigators attempt to conduct interviews that are unannounced, or unscheduled, at your work station, or if they contact you at locations outside your work area:

1. Do not respond to the auditor's or investigator's questions in such circumstances. You are not required to do so.

2. If the audit is being conducted at work, contact your supervisor immediately.

3. If you are contacted outside the work area, instruct the auditor or investigator to contact your supervisor during regular working hours. Also inform your supervisor as soon as practical of the contact made by the auditor or investigator.

4. Be courteous to the auditor or investigator. Your's and the Company's right to refuse to provide information without the prior approval of appropriate management should be exercised in a firm, businesslike and polite manner.

BCAC Finance

Bell Aerospace TEXTRON

Division of Textron Inc.
Post Office Box One
Buffalo, New York 14240

INTEROFFICE MEMO

26 November 1984

TO: Messrs. P. B. Gannon, U. E. Hilger, J. J. Kelly, R. A. Norling, J. B. Timbrell

SUBJECT: Government Audit Activity

The IG has noticed NOO and NFO of its intention to inspect a specific number of contracts. It is imperative that all communication with the IG should be specifically regulated.

The following shall be the Bell Aerospace policy with respect to any IG inspections:

1. The attorney contact between BAT and IG is J. Hedges, 716-696-6916. This shall be the sole point of contact with the IG for BAT.

2. All questions directed to Bell employees by the IG shall be referred to the attorney contract for coordination of the reply.

3. Any request for written material which may be received from the IG or DCAA concerning matters under investigation by the IG shall be referred to the attorney contact for action.

4. The affected Operations shall appoint an interface representative to work with the attorney contact to assemble any information to be released to the IG. All information which may be subject to the investigation may be released with the approval of the attorney contact.

5. Attorney Client Privilege shall be maintained within the Division concerning all matters pertinent to the investigation.

6. In order to maintain Attorney Client Privilege, employees should not discuss any matter under investigation of the IG with any person including other Company employees except the attorney contact, or under his direction.

BELL AEROSPACE TEXTRON
Interoffice Memo

Government Audit Activity

26 November 1984
Page 2

7. Any efforts by IG or DCAA to communicate directly with a Division employee should be communicated to J. Hedges (6916) including the time of the contact, and information requested.

8. Advise the attorney contact of any action by the IG affecting the Company which becomes known to an employee.

N. E. Willcox
President

GENERAL ELECTRIC

DOMESTIC APPARATUS AND ENGINEERING SERVICES DIVISION

• MAIL ADDRESS:
DAESD-Legal Operation
One River Rd, Bldg 6-202
Schenectady, NY 12345

• TELEPHONE:
8*235-3720

January 30, 1986

TO: All Employees of ASD and Richmond Apparatus Service Shop

The purpose of this letter is to inform you of GE's position with regard to interviews by Department of Defense Inspector General auditors when accompanied by a GE Finance Representative. (At all other times, when an ASD employee is approached by a an employee of the Inspector General's office or an FBI agent, the employee should first call the ASD Legal Operation prior to talking with any of the aforementioned Government officials.)

The GE Finance Representative (Rep) will be in charge, in that no interview will take place without the Rep and the Rep will be able to end the interview at any time. In addition, the Rep will be able to independently ask questions of the employee to ascertain the accuracy and completeness of any response given by the employee, as well as to clarify any unclear questions asked by the DODIG auditor.

The purpose of the audit is to determine whether the Company and its employees have complied with all applicable laws and regulations in negotiating and administering contracts with the U.S. government. The questions should be factual in nature-that is, the questions should ask the employee what the employee actually knows of his or her own personal knowledge concerning a specific job, job element or record.

GE's position is that the employee should try to give accurate, complete and responsive answers to all questions asked by the auditor and not objected to by the Rep. However, it should be clear that accuracy and completeness can only occur when the employee is sure of the meaning of the question and clearly knowledgeable of the subject matter. If the question is unclear, ask the auditor to be more specific until you are satisfied that you know what is being requested of you. Also, employees are specifically directed not to speculate or guess about the answer. If you know the answer, say so. If you don't know the answer, say "I don't know." If you are unsure of the answer, you have the right to say "I'm not sure" and confer with the Rep. The auditor will allow you to develop the answer with the Rep after the initial questioning is over, and you can get back to the auditor at a later time with an accurate and complete response.

You, therefore, have three options in answering a question:

(1) if you are sure you know the answer, you can give the information at once;

(2) if you are sure you don't have any information on the subject, you can say "I don't know;" and

(3) if you need time to develop an answer by reviewing your files, you can defer any response until you and the Rep can develop an accurate and complete response.

Again, discuss only those matters which you know about; don't try to guess or speculate about other people's activities or other matters outside your actual knowledge.

Finally, you should be aware that false information knowingly given to Government officials or evidence of intentional mischarging may give rise to criminal charges. The Government has been more active in recent years in pursuing such matters in the courts. You do not have to grant interviews, and GE is not going to force you to do so. The choice to grant an interview is a personal choice. However, GE requires its employees to comply with all GE and DAESD policies and encourages its employees to discuss, in a controlled environment, their efforts to comply with these policies. Any employees who feel that they cannot grant an interview should discuss the matter with ASD Legal Counsel at their earliest convenience.

Very truly yours,

William P. Thornton Jr.

William P. Thornton, Jr.
Counsel
Apparatus Service Department

WPT:cma

Michael J. Philbin
President

Eaton Corporation
AIL Division
Commack Road
Deer Park, New York 11729
(516) 595-3483

17 October 1985

Dear Staff Member,

Many of you have probably read or heard of the investigation of this Division by the Department of Defense and the Department of Justice.

Eaton has for several months been cooperating in this investigation by providing documents and making people available to provide information to the agents and attorneys for the government.

Several months ago we reached an understanding with the government that if they needed either documents or people, they would first contact the attorneys for the company so that the process of gathering, reviewing and providing information would not interrupt or unduly impose on the daily affairs of the company or its employees.

During this past weekend, without notice to either the company or its attorneys, and contrary to our understanding, agents of the government visited our employees at their homes and attempted to interview them about the affairs of the company. A number of employees cooperated; a number were confused as to the agents' purpose; and a number declined to cooperate without notice to the company or the presence of the company counsel. I regret that these employees and their personal lives were imposed upon during the weekend without having the benefit of the advice of counsel; the benefit of preparation or notice of the subject of the interviews.

To avoid a repetition of this unnecessary disruption of your personal lives, I want to make sure that each of you understands that you have the following options if contacted outside the company premises:

- o you are free to be interviewed
- o you are free to decline to be interviewed
- o you may consult with company counsel or individual counsel provided by the company before deciding to cooperate
- o you may insist on the presence of company counsel or individual counsel before answering any questions

Eaton is following this investigation closely and has a deep and abiding interest in how the investigation is conducted and the results of the investigation. The company is concerned that its employees be treated fairly and be fully informed of the nature and scope of the investigation. The company wants to ensure that your respective rights are protected in responding to the requests of the government agents.

Accordingly, when you are contacted by the government agents the company would appreciate your calling the following number: 595-3857. We, in turn, will contact company counsel who will then contact you directly.

Thank you for your cooperation.

M. J. Philbin

Senator BINGAMAN. Your testimony indicated that the Ill Wind investigation "highlighted several internal management control areas that need strengthening to make the system less vulnerable to such abuses in the future." Please describe: (1) the areas in which the Department should focus priority management attention to make the acquisition process less vulnerable to procurement fraud in the future; and (2) specific internal actions the Department should take with respect to these areas of interest.

Mrs. CRAWFORD. First, it is important that a clear policy be established regarding the release of acquisition-related information. The Congress recognized that requirement in section 822 of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189), which directs the Secretary of Defense to prescribe a single, uniform regulation for dissemination of, and access to, acquisition data. The Deputy Secretary of Defense issued interim guidance along those lines on April 26, 1990. All DOD program offices and contracting organizations now have the task of fully informing their personnel of the guidance and enforcing it through appropriate, local internal controls.

A second source of concern is avoiding the misuse of multiple "best and final" offers. The DOD issued interim guidance to help control the problem in July 1988, and the Defense Federal Acquisition Regulation Supplement now contains an adequate rule in Subpart 15.6. Again, it falls to the Source Selection Authorities, Heads of Contracting Activities, and Service Acquisition Executives to establish controls at various management levels to ensure compliance.

One vital, but frequently overlooked, aspect of internal control systems is the effort to raise ethics awareness among all personnel. The Defense Ethics Council has been established, pursuant to the Defense Management Report to the President, to develop and coordinate more systematic DOD efforts in that area. It is important that meaningful, timely ethics training be provided to all acquisition personnel. It was, after all, a recipient of a routine briefing on post-employment restrictions who made the initial allegations leading to Ill Wind.

The DOD must also continue its measures to decrease the dependence of its program offices on consultants and to limit consultants' access to contracting officials. We support the Navy effort to substitute civil servants for consultants in the Systems Commands. The total elimination of contracted advisory and assistance services in organizations of that kind is not feasible; however, internal controls must be established in all DOD offices where consultants (contractor employees) are present to ensure that their activities are adequately monitored, potential conflicts of interest are avoided, access to Government data is strictly circumscribed, and accurate reporting on contracted consulting activity is made to higher management levels.

Senator BINGAMAN. Your testimony notes the positive steps that have been undertaken to promote contractor self-governance, particularly the Voluntary Disclosure Program and the Contractor Risk Assessment Guide Program, but you also took note of the relatively low rate of participation in these programs by defense contractors.

What role, if any, can the Contractor Risk Assessment Guide Program, voluntary disclosure programs and contractor self-governance programs play in the early identification and detection of procurement fraud?

Mrs. CRAWFORD. The aforementioned programs are not designed to detect procurement fraud directly. They are designed, however, to help prevent fraud by establishing reliable contractor internal control systems (in the case of the CRAG), by encouraging disclosure of wrongdoing (in the case of the Voluntary Disclosure Program) and by encouraging contractors to implement more effective internal accountability programs (in the case of self-governance programs). When company employees are aware that the company is committed to disclosing wrongdoing to the Government, these employees may be deterred from engaging in the improper activities in the first place.

Senator BINGAMAN. What are the current impediments, real or perceived, to greater contractor participation in these programs?

Mrs. CRAWFORD. *CRAG*—Some contractors may believe that the CRAG is designed merely to expand Government access to company internal records. Such an allegation has no basis. Other contractors may believe that the DOD is not serious about reducing oversight, even when it is evident that a contractor's internal control system is reliable. Again, the DOD has gone on record many times to announce its objective of ensuring that its oversight is commensurate with quality and reliability of contractor internal controls. Direct oversight *is* being reduced under the CRAG. Still other contractors may believe that CRAG participation is not cost effective, in that it would be too costly to evidence the reliability and quality of their control systems. The CRAG does place the responsibility for demonstrating the ef-

fectiveness of control systems on the contractor. We do not believe, however, that the program places any undue burden on an effectively managed organization. If a reliable and quality internal control system is in place, demonstrating that fact should not be a costly undertaking.

The perceived impediments have been voiced by contractors who are *not* participating in the CRAG program. Hopefully their concerns will be dispelled by the positive experiences of the contractors who are participating. The DOD is ready to address any problems with the CRAG program and welcomes feedback from all interested parties on how to improve it.

Contractor Self-Governance—The only contractor initiated program that we are aware of is the Defense Industry Initiative on Business Ethics and Conduct (DII). The DOD supports the program. We believe that the CRAG and the voluntary disclosure programs are the best means of achieving many of the DII objectives. The DOD has organized the Defense Advisory Panel on Government Industry Relations to promote better relations and to encourage contractor self-governance programs. We cannot comment on the reasons behind DII participation levels. We have heard that some contractors prefer to implement self-governance initiatives on their own. We are less concerned with the extent of formalized participation than we are in actual, effective self-governance action.

Voluntary Disclosure Program—The Government has made no commitments regarding the outcome of any voluntary disclosure. Therefore, there are risks that disclosing a matter may result in adverse consequences: (1) prosecution, (2) the Government seeking significantly more money than reported owed by the contractor through expansion of audit to other issues or double damages, (3) suspension and debarment, (4) Government investigation into other matters that were not covered by the initial disclosure, (5) waiver of attorney-client and attorney work product privileges, (6) third party litigation, (7) disclosure may result in the disallowance of attorneys' and other costs after the discovery of the misconduct, and (8) resolution of the matter after disclosure takes too long. There is the risk to a disclosing company that one of the above adverse actions could result from the disclosure. Many companies view the risks from disclosing to outweigh the benefits from participating in the Voluntary Disclosure Program or the risks from nondisclosure.

Senator BINGAMAN. What can be done to address these impediments?

Mrs. CRAWFORD. The impediments discussed above are more perceived than real. Often their basis is anecdotal and unsubstantiated. Clearly, contractors need to participate in order to present their experiences—good or bad. The DOD should not be put in the position of defending its programs or motives against charges made by persons who are not participating in the programs. In cases where actual problems exist, impediments can be addressed and solved. We stress how important it is to have actual participation in and experience with the programs as the basis for evaluating the programs.

The Government cannot make the Voluntary Disclosure Program risk free. What we can do is to ensure that the Government verification audits and investigations are conducted as expeditiously as possible and that the benefits of the Voluntary Disclosure Program are provided where appropriate. These include the following: (1) no suspension or debarment action will be taken based on the disclosure and that any suspension or debarment decision will take the voluntary nature of the disclosure into consideration (there have been no suspensions or debarments by disclosing contractors); (2) prior to any decision to prosecute a disclosing company by a U.S. Attorney's Office, the matter will be reviewed by the Defense Procurement Fraud Unit, Criminal Division, Department of Justice, to ensure that any prosecution is in accordance with the Department of Justice Voluntary Disclosure Guidelines; (3) these guidelines provide that the voluntary nature of the disclosure and cooperation with the Government are factors to be weighed in any prosecutive decision (there have been three prosecutions of disclosing contractors); (4) the disclosure reduces potential liability under the False Claims Act from treble to double damages; (5) the Voluntary Disclosure Program creates a formal structure for a dialogue between the contractor and the Government components responsible for criminal, civil and administrative remedies; (6) the disclosure can eliminate much of the disruption and uncertainty surrounding a Government investigation; and (7) voluntary disclosure is a policy that helps ensure the Department of Defense that it is dealing with contractors with the highest standard of integrity and honesty.

Senator BINGAMAN. Is there a way to clearly assess the success of such programs in terms of measurable reductions in Government oversight or improvements in contractor compliance with statutory and regulatory requirements?

Mrs. CRAWFORD. Program results can be assessed, but we need a high level of contractor participation. Improvements in DOD oversight, including oversight efficien-

cy, and contractor compliance with Government requirements can also be measured. Clearly, the success of the program depends on the commitment of both the DOD and defense contractors. The DOD supports the concept of voluntary programs. Industry needs to demonstrate the willingness to work with the DOD. The programs which have been discussed above represent the media for demonstrating such a willingness.

Senator BINGAMAN. What actions are being taken to discuss with defense contractors their perceptions of these programs and to develop initiatives to overcome impediments to the participation?

Mrs. CRAWFORD. *CRAG*—The DOD is supporting a plan by the Institute of Internal Auditors to hold a conference on CRAG program experiences. Major CRAG participants will discuss their experiences with the program and answer questions from the audience of defense contractors. The DOD will make available DCAA representatives to address any questions or issues on a case-by-case basis. Hopefully, any concerns or perceived impediments will be laid to rest or targeted for resolution.

Voluntary Disclosure—The IG, DOD, participates in many panels and seminars with industry representatives to explain the Voluntary Disclosure Program and explain its benefits and clarify any confusion of misperceptions regarding the program. We also work actively and frequently with the Criminal and Civil Divisions of the Department of Justice who are responsible for administering the Program to ensure that this joint program recognizes those contractors who have made disclosures. We also schedule quarterly meetings with the investigative organizations to ensure that the verification of the contractor's disclosure are being expeditiously worked and that any problems are addressed and resolved.

Senator BINGAMAN. Are any legislative incentives required to promote greater participation in these programs?

Mrs. CRAWFORD. We do not believe that legislation is required because we support the concept of voluntary participation in these programs. In a way, the responsibility of participating in a voluntary program clearly demonstrates intent and commitment. Instead of forcing participation, we need your support in encouraging fence-sitters to participate in the program.

Senator BINGAMAN. Your testimony noted that significant improvements in regulating the use of consultants will be difficult until the Congress, Office of Management and Budget, and the agencies resolve differences over the definition of "contracted advisory and assistance services." What are the essential elements of such a definition in terms of identifying services: (1) that should be performed only by the government; and (2) if performed by contractors, should be subject to the rules governing consulting services?

Mrs. CRAWFORD. In regard to the first part of your question, contractors are not to be used to perform inherently Government functions, which include activities of a policy-making, decision-making, or managerial nature. These functions require the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Contractors may be used to develop products or provide technical or financial advice to program officials. They should not be used to make or formulate Government policy, develop acquisition strategies, define the Government's needs, make reprogramming or reclama decisions, establish Government estimates, perform Government "should cost" analyses, or evaluate cost proposals for source selection purposes.

Also, contractors should not be required to provide personal services during contract execution. Personal services situations can occur when the need for a particular service is long-term, the services are needed to perform an integral effort of the agency or command in furtherance of its assigned mission, performance is at the Government's site, the principal tools and equipment are furnished by the Government, comparable services are performed in the same agency or command or in similar agencies or commands using Government personnel, or the manner in which the services are provided requires that Government personnel provide direction and supervision to contractor personnel in order to protect the Government's interest or retain control.

Additionally, the use of a contractor should be the most economical way to obtain the advice or assistance. The services should be procured only when equivalent services are not readily available within the Government.

In regard to the part of your question on the rules governing consulting services, contractor involvement in the acquisition and financial areas should be limited so as to ensure that business sensitive information is safeguarded from unauthorized disclosure or compromise. Business sensitive information is information, which if released or disclosed, might jeopardize the competitive procurement process or cause substantial harm. Where the risk of compromise of the acquisition process is per-

ceived to exist, contractors should not be used. Program officials should limit and control contractor access to computer storage devices and word processing systems and hard copy documentation containing business sensitive information. Appropriate non-disclosure and exclusion agreements should be part of the contracts and individual agreements should be signed by contractor employees. Contractor personnel should not be used to evaluate contractor proposals during source selection and should not attend meetings or discussions relating to source selection or policy issues. When contractor personnel attend other meetings, they should be introduced as contractor employees rather than representatives of the agency.

Also, contractors providing management support services should be used to create an in-house capability as soon as practicable to avoid a long-term dependency on contractor support. Repeated or extended arrangements for contracted and advisory services should not be entered into except under extraordinary circumstances and only after approval at a second level or higher above the requesting organization. A cost-effectiveness analysis that evaluates the use of contractor support and civil service personnel should be required if a long-term dependency exists. Requests for contracts for advisory and assistance services to be awarded during the fourth quarter of a fiscal year should also require a second level or higher approval. Approval of all other contracts for advisory and assistance services should have written approval of at least one level above the requesting organization.

In addition, contracts for advisory and assistance services should be competitively awarded unless the conditions for noncompetitive awards are met. The work statement in the basic contract must describe specific details of work required and specify a fixed period of performance. Contracts should require identifiable deliverables, quantities, and due dates. Preference should be given to awarding firm fixed price contracts for contractor efforts. Small business set-asides should require that at least two small business firms bid on the effort and that the firms are capable of providing a substantial part of the effort with in-house resources. Contract clauses and the tasking statement must preserve the Government's responsibility for control over its programs. Contracts should not require the contractor to directly support the acquisition documentation or source selection process, or develop final budget, financial or business sensitive information. Contracting officers must examine each contracting situation to determine the potential for conflict of interest and take steps to avoid any conflict believed to exist. Conflict of interest and non-disclosure clauses should be made a part of the contract, and individual agreements should be signed by the contractor employees.

Finally, contracts for advisory and assistance services should be properly administered and monitored to ensure that performance is satisfactory. Contracting officer technical representatives should maintain arms-length relationships with the contractor to ensure that prohibited personal services do not arise. Persons appointed as contracting officer technical representatives should monitor the contractor's performance and notify the procuring and administrative contracting officers of deficiencies in performance or noncompliance with contract terms and conditions. The services should be evaluated at the conclusion of the contract to assess the utility of the work performed.

[Whereupon, at 4:07 p.m., the subcommittee was adjourned.]

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